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THE AMERICAN JOURNAL OF INTERNATIONAL LAW is supplied to all members of the American Society of International Law without extra charge, as the membership fee of five dollars per annum includes the right to all issues of the JOURNAL published during the year for which the dues are paid. (Members residing in foreign countries pay one dollar extra per annum for foreign postage.)

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THE LAW OF HOSTILE MILITARY EXPEDITIONS AS APPLIED BY THE UNITED STATES

CHAPTER I. INTRODUCTION

By the time of the establishment of the American Government the practice of the nations with regard to their mutual obligations had begun to resolve itself into fairly well-defined principles. Among these was one to the effect that one state must prevent the use of its territory and resources for hostile attacks upon its neighbors with which it is at peace. In the beginning this rule was evolved from the relations of neutrality; for the more pressing needs of the time of war tended to crystallize usage applying to it, while other practice was still incoherent. But obviously the law thus defined was only a phase of the general duty of a state to prevent injurious and offensive acts against friendly countries. The obligation is based upon the complete and exclusive control which the sovereign is presumed to exercise over its subject persons and territory. The authority of the sovereign exists alike in time of war and time of peace; and the requirement of the law extends as well to normal relations as to the exceptional conditions of neutrality.

1. RELATION OF THE AMERICAN PRACTICE TO THE SUBJECT

The United States was early called upon to apply this principle in both its phases. As a neutral during the French revolutionary wars it applied it the more strictly because of its desire to disengage itself from the embroilments of Europe. But at the same time, the unsettled condition of the neighboring Spanish colonies, and the uncertainties of international politics affecting the American continents, tempted the American frontiersmen to take the destinies of these lands into their own hands, and directed the attention of the government to this newer phase of its duty. In 1792, President Washington, in his annual message to Congress, particularly recommended to its consideration "the means of

preventing those aggressions by our citizens on the territory of other nations, . . . which, furnishing a just subject of complaint, might endanger our peace with them." [1]

Both phases of the law were soon put into the form of a statute, but no violation of its provisions has been a more continuous source of difficulty and annoyance than the fitting out of hostile military expeditions. The annexation of Louisiana, Texas, Canada, and Cuba have been inviting prospects, and only recently has difficulty from this source appeared to cease. The independence of various colonies furnished the motive for the filibusters: the revolutionary wars in South and Central America, and the patriotic movements in Texas and Cuba have been seconded by American adventurers. Often, however, less generous impulses have inspired the filibusters, and love of adventure and excitement, and the chance of personal gain, have been the real or sole motives back of the unlawful enterprises.

Very recently (1911), the United States has been compelled to concentrate an army of twenty thousand men on the Mexican border for the purpose of enforcing the neutrality laws and to prevent the crossing of hostile parties into Mexico.[2] Apparently the story of filibustering is not a closed chapter.

The number and variety of the causes present to induce undertakings of this sort have given America numerous occasions for the application of the principle of international law. The number of these expeditions renders the practice of the United States especially valuable in this field of the law. The matter is particularly American, so much so that scant attention has been given the subject in most text books. Filibusters are rather peculiar to America. The conditions which have offered the occasion for their occurrence have existed chiefly in the western hemisphere. The sparseness of population, the backwardness of many small independent states in economic development, intolerable or inefficient governments in those countries, a restless and migratory population in

[1] Richardson, Messages and Papers of the Presidents, I, 125, 128. See Washington's Annual Address, 3 Dec. 1793, American State Papers, For. Rel. I, 21.

[2] "The American troops have been sent to form a solid military wall along the Rio-Grande to stop filibustering and to see that there is no further smuggling of arms and men across the international boundary." Press correspondent with President Taft, Augusta, Ga., March 8, 1911. See Review of Reviews, Vol. 43, p. 406 (April, 1911).

the United States,—these have combined to create situations favorable to depredations of all descriptions. Perhaps the protected position of the Latin-American governments has prevented such forcible reform as would have effectually altered such a situation. Europe has had occasional expeditions, it is true, but they have been directed for the most part against western countries. Whatever the reasons, these peace-time aggressions on the part of individuals have been of less concern outside of America. And the practice of the United States is the more valuable because it has been most often on the defensive, and has developed a standard of obligation to be enforced almost entirely against itself.

The principle of international law is, of course, not regarded as dependent on the will of any particular state: some further authorization is necessary. This is well recognized by the United States in the fulfillment of its obligation with regard to hostile expeditions. The American courts, in so far as they are not bound by statute, apply the law derived from the practice of all nations and are not restricted to purely American authorities.[3] But in the absence of clear and definite rules developed by long custom in the world at large, we are compelled to resort to the evidence of the most extensive precedents. In one sense the practice of the United States is to be regarded as a source of the principle of international law. It is that most extensive practice wherein the best evidence of the law is likely to be found. Furthermore, since this is a country which has had much to do with expeditions, the consensus of international opinion is incomplete without large regard for the American attitude toward the subject. The principles with regard to the present subject have come to be recognized largely through their application by the United States, and the working out of their details have here received the fullest attention.

The municipal law of any country may be framed with the intention

[3] "The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. . . . The decisions of the courts of every country, so far as they are founded upon a law common to every country, are received not as authority, but with respect. The decisions of every country show how the law of nations, in a given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this." Chief Justice Marshall, in Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191, 198. See also the Paquete Habana, 175 U. S. 677, 700, and Respublica *v.* De Longchamps, 1 Dallas, 111.

of facilitating or improving the execution of international law, and may, in such cases, exceed the strict requirements of the latter. On the other hand, the state may prefer to make no provision at all in its statutes for the fulfillment of international duties. It may prefer to meet its obligations by other methods. Its municipal law will then afford us no evidence even of that state's conception of its duty. The courts, also, having before them such statutes to be applied, may neglect the international obligation out of which the statute arises. For these reasons national laws and practice based on them need to be carefully handled in discussions of international law. But the conception of the law entertained by any state cannot otherwise be determined than by the sum of its application of the law.[4] The legislation of the United States on the subject of expeditions, and the opinions of its executive and diplomatic officers, have been expressly declaratory of an international duty. International complications and dangers demanded the enactment of the neutrality acts. They were passed in response to an international obligation.[5] In the execution of the statutes the government has regarded the foreign states in whose behalf the execution was undertaken. The courts in expounding the statutes have attended to their purpose and to the international law they were intended to enforce.[6] Whether or not this American practice conforms exactly to the requirements of international law, it is the evidence of America's idea of that law. It is that idea we are to set forth.

2. RELATION OF THE SUBJECT TO OTHER BRANCHES OF INTERNATIONAL LAW

Despite the fact that expeditions have occurred least frequently in time of recognized warfare, such discussion as there has been of them has been offered under the title of neutrality. This is unfortunate, because it implies the basing of the law entirely on the duty of impartiality, and the full significance of the principle of non-interference is not

[4] Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191.

[5] S. Ex. Doc. 112, 41 Cong. 2 Sess. p. 3.

[6] See Ross *v.* Rittenhouse, 2 Dallas, 160, 162; Murray *v.* Schooner Charming Betsey, 2 Cranch, 64, 118; Talbot *v.* Seeman, 1 Cranch, 1; Chacon *v.* Eighty-nine Bales of Cochineal, 1 Brock, 478 (Fed. Cas. 2568).

discovered. The obligation of the state is in no sense dependent on the state of belligerency.[7] Though the statutes of the United States have been passed under the caption of "neutrality acts," they are interpreted to extend to all warlike expeditions from this country whether intended to aid one belligerent against another, or directed against a friendly power at peace with all countries.[8] The word *neutrality* forms no part of the statute itself, and the statute conforms to that law of nations which interdicts warlike aggressions at any time and under all conditions against friendly countries.

The general duty with which our discussion deals may be phrased as one of non-interference and neutrality. This is intended to signify not only the exclusion of offensive and injurious conduct, but also the impartiality required by the law of neutrality. As between states in time of peace, the one must not be found at fault when the other has been offended or injured, nor when the rights of its citizens have been invaded. As between states when one is a belligerent, the other a neutral, the latter shall not even inadvertently prejudice the cause of the former. In fulfillment of these obligations it is required, first, that the state shall abstain from all action on its own part in derogation of the sovereignty or the peace and safety of another state. With this phase of the duty we are here not directly concerned. The organization of expeditions is clearly beyond the scope of this rule; for the organization of expeditions by the government is war itself, and destroys the relation of peace which the law presumes. The things from which the state must abstain are such as the intervention in the internal affairs of another state, or the violation of its territory by trespass or by the exercise of jurisdiction therein. Likewise the state must admit a direct responsibility when, being in the position of a neutral, the government or its agents render armed assistance or afford pecuniary aid to a belligerent. These are

[7] U. S. *v.* O'Sullivan, 9 N. Y. Legal Obs. 257 (Fed. Cas. 15974).

[8] "The phrase 'neutrality act' is a distinctive name applied for convenience sake merely. . . . The scope and purpose of the act are not thereby declared or restricted. The act itself is so comprehensive that the same provisions which prevent our soil from being made the base of operations by one foreign belligerent against another likewise prevent the perpetration within our territory of hostile acts against a friendly people by those who may not be legitimate belligerents, but outlaws in the light of the jurisprudence of nations." For. Rel. 1885, 776. See also U. S. *v.* O'Sullivan, Fed. Cas. 15974, and same, Fed. Cas. 15975. Also 21 Op. At. Gen. 267, 270.

infractions of neutrality. But when the state goes so far as to provide organized armies it has destroyed the status of neutrality.

The second phase of the obligation requires a state to take reasonable measures to prevent action by private persons within its jurisdiction, directed against the peace and safety of friendly states or their citizens. Some of these offenses require to be punished as a matter of general public policy, and for the welfare and security of the state punishing them. That is the case with offenses against resident aliens, and with counterfeiting. These are crimes in the view of the ordinary municipal law. But of more obvious international consequence are the strictly political offenses. It is in this class that we find hostile expeditions.

In time of war the scope of this second rule is greatly increased. It is then necessary to restrain belligerents as well as individuals. Overt hostile acts within the neutral jurisdiction are to be prevented, and there are numerous proximate acts of hostility which both the belligerents and the neutral nationals may undertake that are included in the general prohibition.

The third rule goes to the enforcement of the prohibition by the state liable to injury. It requires acquiescence in such action on the part of the offended state as may be necessary for its self-defense, or such as may be justified by the failures of the sovereign within whose jurisdiction the objectionable action is begun. We are familiar with such action by belligerents for the enforcement of blockades and of the law of contraband. Nations are accustomed to tolerate interference with their trade and with the liberties of their citizens for these purposes. They are also subject to such risks and damages arising out of the state of war. So in time of peace a hostile expedition may give cause for similar measures to which no valid objection may be raised.[9]

[9] The following outline is illustrative of the classification here adopted:

Duty of Non-interference		*and Neutrality*	
I. Abstention from	1. Intervention in internal affairs	i. Directly injurious acts	a. Armed assistance to the enemy
	2. Violation of territory	ii. Indirectly injurious acts	a. Sale of munitions, loans of money, etc. b. Grants of discriminatory privileges.

The broadest and most important division of the subject so classified, is that dealing with proximate acts of hostility. It is so by reason of the number of the offenses included there and because of the extensive practice of which it has been the subject. Nevertheless it is here that considerable looseness, and even confusion, of terms has occurred. The greater number of the specific offenses under this heading are grouped by one author under the "use of the territory of a neutral as a *base of operations.*" [10] Another employs the same phrase to apply only to use of the territory by a belligerent.[11] A third makes continued use the crucial test of a base of operations.[12] Likewise, in a broad sense, any act in aid of a belligerent is an "augmentation" of his fighting strength; but the term "augmentation of forces" is applied commonly to an increase of equipment within neutral jurisdiction. Sometimes, therefore, hostile expedi-

	Duty of Non-interference		*and Neutrality*	
II. Prevention of	1. Political offenses	a. Hostile expeditions	i. Overt hostile acts	a. Attacks on vessels of war b. Capture of merchantmen
	2. Criminal offenses	a. Counterfeiting b. Marauding c. Offenses against citizens	ii. Proximate acts of hostility	a. Fitting out of hostile expeditions b. Recruiting c. Fitting out of ships of war and cruisers d. Service to enemy fleet e. Establishment of bases of communication, etc. f. Abuse, of asylum: In sheltering warships; In sheltering prizes; For base of attack; By augmentation of crew, munitions, supplies.
III. Acquiescence in	1. Measures of self-defense 2. Punishment of citizens		i. Incidental damages	
			ii. Interference with citizens	a. Enforcement of blockade b. Search for and capture of contraband

[10] See Holland, Thos. E., Neutral Duties in Maritime War, Proc. Brit. Acad., II, 55.

[11] See Moore's Digest, Chap. XXVIII, III, 6.

[12] See Hall, W. E., International Law, p. 605.

tions are not clearly distinguished from other unlawful operations. No doubt an expedition may be an augmentation of the fighting power of a belligerent, and a hostile enterprise may make neutral territory its base of operations, if by base is meant place of departure. The term, "hostile expedition," itself is made to describe very different things. In one case the regularly organized forces of a belligerent are considered as an expedition; in another, the term refers to vessels built in neutral ports for the commissioned service of a belligerent; [13] and sometimes it is used to refer to unauthorized combinations of individuals for warlike purposes. A more restricted use of these terms will enable us to distinguish expeditions from other well-defined classes of offenses.

A hostile expedition is a combination of individuals, subject to the jurisdiction of a particular state, for the purpose of conducting military operations against another state in its political capacity, the two states being at peace with each other. The idea here conveyed is meant to embrace action by citizens and by aliens, instigated by private persons or by foreign governments. It excludes action by individuals separately; it excludes non-military operations and attacks on private persons as such. Hostile expeditions will not be confused, therefore, with mere marauding invasions which are undertaken for the piratical ends of rapine and plunder. The concerted action of organized companies is clearly distinguishable also from the recruiting of individuals for the regular forces of a belligerent state. Every individual enlisted is, of course, an element of strength to the party that enlists him, but he is not a unit capable of immediate hostilities. The hostile expedition involves the preparation on friendly soil of a force capable of immediate and independent action against the state, and presumably able to defend itself. The individual recruit is so much material for warfare, but the expedition is itself a warring party.

In a similar way the fitting out and arming of ships of war and cruisers by belligerents in neutral waters is to be regarded as the addition of units to the fighting forces of the government that commissions them. It is an increase of equipment. But a hostile naval expedition exists only when the vessels are manned and prepared for independent par-

[13] See 1 Amer. St. Pap., For. Rel. 608; and Davis, Elements of International Law (3rd ed.), p. 404.

ticipation in the hostilities. Likewise the furnishing of supplies to belligerent fleets only indirectly injures another state,—no direct attack is involved.

The law requires the state to prevent the use of its territory for the establishment of stations of supply and communication, or as the base of attack against another state, but it would stretch the word *expedition* too far to include within its meaning the regular military and naval forces of a belligerent in the ordinary pursuit of their enemy.

Thus expanded, the idea of a hostile expedition is that of the necessary elements of a fighting force, combined into an effective unit, organized on friendly soil, designed for independent operations, and proceeding, not to union with belligerent armies or navies primarily, but to the attack of some friendly nation. Through other violations of the duties imposed by neutrality, a belligerent may receive the increase of men or equipment, he may have the privilege of a base for his operations, or the protection of a friendly asylum; but through an expedition, the belligerent acquires the assistance of a new party to the war. Sometimes there is only the indirect benefit of the attack on the enemy; in civil wars it frequently amounts to an alliance. To the offended state, on the other hand, the delinquency of the offender is more than partiality toward the enemy; it is a positive aggression against itself. It is a direct attack equally offensive in time of peace and time of war.

Hostile naval expeditions do not differ in their essential features from military expeditions. The distinction is of little legal consequence and of scarcely more practical importance. Frequently the two are found in combination. Completely organized naval expeditions are of rare occurrence because of the difficulties in fitting them out secretly, and because of the fact that hostilities on the part of lone vessels are comparatively ineffective when directed against the land or against fleets of warships. Naval expeditions have, therefore, usually taken the form of privateers. Especially in the early part of last century the frequency of their occurrence made them of great importance; but for the future they are hardly to be considered. With the passing of privateering, the opportunity for naval expeditions is largely removed. We shall, therefore, disregard the few exceptional considerations affecting them, and confine our discussion entirely to military enterprises.

Chapter II. Unlawful Distinguished from Lawful Conduct of Individuals

The character of the act of the citizen or subject who makes war upon a country which is at peace with his own is such that its unlawful nature cannot be mistaken. But before his unlawful purpose can be realized, he will have passed beyond the jurisdiction of his sovereign and beyond its power to restrain him or control his conduct. Consequently, if the sovereign is to prevent his hostile action, it will need to restrain him while his attack is still in preparation. It is for this reason that the government finds itself under obligation to perform its duty of prevention while expeditions are still in their incipient stages. To do this effectively, it is compelled to regard not only the internationally offensive stages of these warlike undertakings as unlawful, but also all those steps in preparation which are taken within its jurisdiction. Viewed from the standpoint of the state charged with responsibility, the whole undertaking from beginning to end must be regarded as contrary to law. The statutes of the United States impose penalties on all who "begin or set on foot or provide or prepare the means for any military expedition or enterprise" which is to be carried on from this country.[14]

1. The hostile intent

Naturally it is impossible to define with precision, even in the municipal law, the specific acts which are to be prohibited. The acts done within jurisdiction will be only part of a plan, the preliminaries to the real offense which is to be committed later. These acts in themselves, no doubt, would ordinarily be considered entirely innocent; they become culpable only because of their connection with other inherently objectionable acts. So it happens that the same things, entirely innocent in the one case, may, in another, result in a marauding raid or in a military expedition; and the preparations themselves are not sufficient to determine the innocence or guilt of the parties making them.

In distinguishing military from non-military invasions (in Chapter I),

[14] Act of March 4, 1909, sec. 13, "An Act to codify, revise, and amend the penal laws of the United States."

we employed the test of intent. In distinguishing now the conditions under which the same acts may be considered innocent, on the one hand, or guilty through connection with a military enterprise, on the other, we are compelled to resort to the same test. Obviously, it is the purpose toward which the conduct in question is directed that stamps it with an unlawful character. It is the design to invade another country and to attack its government that attaints these otherwise harmless acts. It is through the intent, the evidence of the probability of unlawful consequences, that the prohibited conduct is to be defined. The presence of all the elements of an expedition, or the inadvertent association of individuals capable of such hostilities, is not objectionable so long as there is no purpose to do an unlawful act. For the intent is requisite to a violation of the law. Said Chief Justice Marshall: "War may be levied without a battle, or the actual application of force to the object on which it is designed to act; (that) a body of men assembled for the purpose of war, and being in a posture of war, do levy war. . . . But the intention is an indispensable ingredient." [15]

The intention contemplated by the law is an individual intent. No person is held to answer for the crimes of the expedition unless his own conduct and intentions are unlawful. So the person who voluntarily joins an expedition is not guilty unless he is aware of its unlawful nature; and the individual who takes part in the undertaking unwillingly does not violate the law, however unlawful the expedition as a whole may be. Certain American citizens who had taken part in the expedition led by Miranda against South America were captured and imprisoned by Spanish authorities. They sought the interposition of the United States for the purpose of securing their release, and alleged that they had unwillingly accompanied the expedition, having been deceived by false statements. When they became aware of Miranda's purpose, they had been forcibly prevented from leaving his service. The desired interposition was granted, the grounds alleged being considered sufficient to free the parties from all culpability.[16]

When it is sought to punish individuals for their part in expeditions already carried out, the evidence of events subsequent to their departure

[15] U. S. *v.* Burr, Coomb's Trial of Aaron Burr, 377 (Fed. Cas. 14694a).

[16] Lloyd's Trial of Wm. S. Smith and Samuel G. Ogden (Moore's Digest, VII, 917).

from the country is usually available to determine their hostile intention and to fix the resulting guilt. Such testimony is then always to be considered.[17] It will not always be necessary to establish the immediate consummation of the purpose of the undertaking. The temporary deviation of the expedition from its actual purpose, or an attempt to evade the law by the pursuit of a circuitous route or by transshipping, are sometimes evidence of unlawful intentions rather than lawful. The guilt of the offenders is not diminished by such facts as these. The real proof of the hostile intention is to be found in the ultimate result of the enterprise and the final conduct of the parties thereto.[18]

But when the participants are prosecuted for their part in the preparation of an expedition not yet carried out, there is seldom sufficient testimonial evidence to show the intent. The necessity for secrecy is present at all stages of these proceedings. The conspirators must guard against the frustration of their attempt by the authorities of both countries concerned. Consequently the government must depend largely on the circumstantial evidences of the unlawful character of the enterprise. The circumstances which are material to this point will vary greatly in different instances. Secrecy and mystery in the arrangements and in the departure of suspected persons and arms is ordinarily an evidence of criminality to be considered, but, of course is not conclusive.[19] It may happen that purely commercial undertakings will require secrecy to prevent the confiscation of contraband goods by a belligerent. Thus the difficulty of laying down fixed rules is apparent. The evidence of hostile intent is to be found in the conformity of an undertaking in question to the ordinary and requisite characteristics of such enterprises. But more definite rules are impossible.

The application of the test of intent to certain somewhat questionable transactions will serve to eliminate them from the category of unlawful conduct. The shipment of arms and munitions of war has been of frequent occurrence. When destined to a belligerent country or to an insurrectionary faction in some state, it is very certain that the arms

[17] U. S. *v.* Nunez, 82 Fed. 599, 609.

[18] U. S. *v.* Smith, Fed. Cas. 16342a. Also U. S. *v.* Rand, 17 Fed. 142.

[19] U. S. *v.* Nunez, 82 Fed. 599; also U. S. *v.* Hart, 78 Fed. 868; and U. S. *v.* Pena, 69 Fed. 983.

will be used, and are intended to be used, for warlike purposes against a friendly state. But this fact in itself is not sufficient to condemn the transaction. It is not the purpose of the law to prohibit the shipping of arms and materials of war when the parties making the shipment are engaged only in a commercial venture. So far as such shipments are contrary to the interests of other states, they will be subject to the risk of capture and confiscation as contraband, or to seizure when landed in the port of their destination. But it is necessary that the transportation of the arms be free from all features of a military character, and that the persons supplying or carrying them shall not in any way be parties to a conspiracy against another government, or have any intention of directly using the arms in a hostile way.[20] Furthermore, there must be no intention to turn these munitions over to those having such hostilities in view, nor a purpose that men shall be added in the course of the transportation so as to render them capable of an unlawful use. This intention changes at once the commercial character of the act, and carries with it the liability for a violation of the law. In the absence of the hostile intent the same vessel may transport arms and men—it may even carry a cargo of arms and a military expedition, and the unlawful character of the latter will not affect the lawful transportation of the arms. But the absence of hostile designs is indispensable.[21]

It is not forbidden the citizens of one country to join the armed forces of another. The rule applies alike to regular forces and to revolutionary or insurrectionary armies. It is, therefore, not a crime against the municipal law to leave the country with an intention so to enlist. For this purpose, citizens or aliens may leave the country in any way they see fit, provided only that they are unarmed and have no intention of combining for hostile attacks or aggressions before reaching their destination. The sovereign of those so enlisting assumes no responsibility for their action.[22] It is true, an intention to enlist involves a purpose ultimately

[20] U. S. *v.* Pena, 69 Fed. 983; U. S. *v.* Nunez, 82 Fed. 599; U. S. *v.* O'Brien, 75 Fed. 900; 13 Op. At. Gen. 541.

[21] U. S. *v.* Rand, 17 Fed. 142; U. S. *v.* Murphy, 84 Fed. 609; U. S. *v.* Hart, 78 Fed. 868; U. S. *v.* The Mary N. Hogan, 18 Fed. 528; U. S. *v.* Two Hundred and Fourteen Boxes of Arms, 20 Fed. 50; U. S. *v.* The Conserva, 38 Fed. 431; 21 Op. At. Gen. 267, 271.

[22] U. S. *v.* Pena, 69 Fed. 983; U. S. *v.* O'Brien, 75 Fed. 900; Chacon *v.* Eighty-nine Bales of Cochineal, 1 Brock, 478 (Fed. Cas. 2568).

to take part in the war, but the hostile action there contemplated will necessarily originate and be completed entirely beyond the jurisdiction of the state from which the person came. An intention, however, to use force to reach the army in which enlistment is to be made, or to do any forcible act before joining the belligerent army, is sufficient to render the proceeding unlawful. For the means of doing the forcible acts will have been secured within the bounds of the friendly state, and for even these slight offenses it must be held responsible.[23]

The presence of large bodies of men who intend to enlist for a foreign war is not substantial evidence of the existence of an unlawful enterprise. They may even be associated and intend to enlist in a body; but if they are unarmed and unprepared for military action, they are incapable of such direct injury to a foreign state as calls for any intervention for its protection.[24] It is no offense to transport companies of this sort, nor to carry arms with them intended for use in the same war or even by these same men.[25] Where men and arms had both been landed in a foreign country by a ship sailing out of the United States, and it was proven that the men afterwards handled and carried the arms, the court instructed the jury that the evidence was not absolutely conclusive of a military expedition, it being possible that the men might intend to act merely as individuals and simply as porters of the arms. In other words, in the absence of the hostile intent, the shipment of men with arms is not contrary to law.[26]

The above illustrations of the applications of the rule are concerned only with the question of the existence of the requisite intention. But, granted its existence, it is yet possible that circumstances may exist to nullify its effect. The intent may be not absolute; it may be dependent on contingencies which remove its unlawful character. The contingency, however, must be one which forms a condition precedent to the intent itself. If preparations have been made for hostilities, to be used only at a time and under circumstances when their use would be lawful, there is no occasion for interference by the government. Thus there is

[23] U. S. *v.* Hart, 74 Fed. 724.

[24] U. S. *v.* Pena, 69 Fed. 983; MS. Notes to Spain, VII, 79 (Moore's Digest, VII, 927).

[25] 13 Op. At. Gen. 541.

[26] U. S. *v.* O'Brien, 75 Fed. 900. See also U. S. *v.* Hart, 78 Fed. 868.

nothing unlawful in the intent or the preparations if the means provided are to be used only on the occurrence of a war which would render the undertaking legitimate.[27] The occurrence of the war is an indispensable element of the plan; it is the condition on which alone the expedition is to be carried out.

On the other hand, a condition precedent only to the undertaking itself is not sufficient. To have set on foot an expedition dependent alone on securing ships for transportation is unlawful, for the condition is one which may simply operate to defeat the enterprise, while it in no way modifies the nature of its purpose. It would be no defense to the offenders to show their expedition to have been dependent on the removal of certain difficulties in the way.

Finally, a condition subsequent to the intent will not legitimize action otherwise illegal. A declaration of war creates a situation in which expeditions are not prohibited. But the state of war offers no defense to one whose conduct had not been contingent on its occurrence. A citizen cannot with impunity anticipate his government's action in declaring war unless the prosecution of his enterprise depends upon its taking place.[28]

2. THE ORGANIZATION OF THE EXPEDITION

The hostile purpose of the individual is to be accomplished by means of an expedition. In the word *expedition* itself there is implied the combined action of a number of individuals. To this extent, the term is expressive of the magnitude of the undertaking the law requires to be prevented. No definite number of men may be specified as necessary to the formation of an expedition, but it cannot be constituted by one or two men no matter what their intention or how disturbing their conduct.[29] Something more is requisite, however, than a mere aggregation of persons. The common purpose which all must have in mind necessitates their association and organization for the accomplishment of that purpose. The hostile intent is something more than unanimity of sentiment or the incidental agreement of the members in their personal

[27] U. S. *v.* Lumsden, 1 Bond, 5 (Fed. Cas. 15641).
[28] U. S. *v.* Burr, Coomb's Trial of Aaron Burr (Fed. Cas. 14694a).
[29] U. S. *v.* Hart, 74 Fed. 724.

intention. It is a positive and aggressive purpose on the part of the expedition as a whole. Consequently, the intention will not be found in the absence of an express or tacit agreement to act together. There will need be at least that mutual understanding of aims and purposes which will make possible effective action. To this end the expedition must be organized and prepared for the attainment of its object.

The degree of organization and the means and methods to be employed, as the number of individuals, are variable factors. Some degree of organization is certainly indispensable. It is essential to that unity of action without which the term *expedition* would be a misnomer. But it is of very little legal importance that there be complete or perfect organization.[30] Defects which would render the success of the enterprise uncertain or improbable in no way affect the guilt of the parties to the undertaking. The means to be employed and the strength of the combination are of little consequence in determining the character of the offense or the culpability of the offenders. Nor can the actual danger to which another state may be subjected increase or diminish the obligation to prevent the unlawful attempt, or the ability of that state to defend itself relieve the obligated government.

The expedition is, of course, a military expedition; it must have something of a military character. "It must have been shown by competent proof that the design, the end, the aim, and the purpose was some military service, some attack or invasion of another people or country as a military force." [31] This much is necessary to the establishment of the fact of its hostile intention, and evidence to this effect is often to be found in the organization of the men into regiments, the presence of arms, or the purchase of military supplies.[32] The designation of officers and leaders, and that concert and unity of action which implies their presence is valid and important evidence.[33]

Ultimately the military character must appear in the form of the expedition's organization. The courts of the United States have sometimes inclined to require that there be a combination intending to be-

[30] Wiborg *v.* U. S., 163 U. S. 632; U. S. *v.* Hart, 78 Fed. 868.

[31] U. S. *v.* O'Sullivan, Fed. Cas. 15975.

[32] U. S. *v.* Ybanez, 53 Fed. 536.

[33] U. S. *v.* Nunez, 82 Fed. 599; U. S. *v.* O'Brien, 75 Fed. 900; U. S. *v.* Ybanez, 53 Fed. 536.

come a military organization before reaching the scene of action.[34] But it has not been deemed necessary that it possess all the characteristics of a military body at the start. Rather, there is no particular element of a military organization that has been considered necessary. The expedition need not be organized into regiments of infantry or cavalry, nor according to any system of military tactics.[35] It is not necessary that the men be drilled or uniformed or prepared for efficient service. However much, therefore, the military organization may add to the completeness and efficiency of the expedition it is not essential to unlawful conduct.

It is immaterial whether the expedition is to act independently or in conjunction with belligerents or insurrectos in the country which they are to attack. For when organized for concerted action, and intending to engage in hostilities as a unit, it is to be considered as unlawful regardless of its subordination to a higher organization.[36] The fact of participation in regular warfare has no direct bearing on the nature of the undertaking. There is the obligation to observe the laws of war under any circumstances. It follows, therefore, that the belligerency of the offended state is not a matter to be considered in dealing with the offenders.[37] Once the organization of the expedition is so far accomplished that the action of its members loses the character of individual enlistment in a belligerent force, the coöperation or union of the party, subsequently, with an army in the country of their destination does not modify the character of the expedition as an unlawful enterprise.

The uncombined and unorganized elements of a hostile enterprise

[34] U. S. *v.* Hart, 74 Fed. 724.

[35] Wiborg *v.* U. S., 163 U. S. 632, 653–654; U. S. *v.* Murphy, 84 Fed. 609.

[36] U. S. *v.* Hart, 78 Fed. 868.

[37] Wiborg *v.* U. S., 163 U. S. 632.

But when the protection of an enterprise is sought on the ground that it is approved by the government of the country to which it is directed, it may become necessary to determine the status of that government. Such an occasion arose in 1855, when a certain Mr. Fabens sought the aid of the government of this country to protect the "Kinney expedition" to Nicaragua. The professed object of the undertaking was colonization, but it had been denounced by the government of Nicaragua as an unlawful expedition. The authority of that government was questioned, but Mr. Marcy, Secretary of State, declined to act, since our minister had recognized it as holding the executive power of the state. 44 MS. Dom. Let. 173 (Moore's Digest, VII, 924).

are not regarded as in themselves unlawful. But they become so when so organized as to constitute an expedition; that is, whenever they are so combined that there exist the means of hostile action. The extent of the organization thus becomes the test of the existence of an expedition. When applied to the case of elements departing from the country as yet uncombined, their capability of proximate combination into an efficient unit will determine their character as an expedition.[38]

In general, the possibility of immediate or proximate employment for warlike purposes may be considered the measure of the organization and preparation which are necessary to such an undertaking as the state is under obligation to prohibit. The United States applied this test during the Franco-Prussian war, when several hundred Frenchmen embarked at New York for the purpose of joining the French army. The vessels in which they sailed carried also large quantities of arms and ammunition. The United States Government took the view that this could not be looked upon as a hostile undertaking, since the men were wholly unprepared for the use of the arms.[39]

It is not necessary, however, that all the elements to be combined should be present at the time of departure. Men or arms are sometimes added or secured in transit. The possibility that the one element when leaving may later be effectively combined with others for warlike action is sufficient to involve those concerned in a violation of the law.[40] In 1895, the American ship *Laurada*, sailing from New York, stopped outside Sandy Hook and took on men and arms. The men drilled during the voyage and prepared for the use of the arms. In remanding the men for trial, the test of the capability of proximate combination was the decisive factor. "However legitimate it may have been to have taken aboard his ship either the men or their arms, or both, for transportation to the island of Cuba, as soon as it became apparent that it was an organized force, capable of proximate combination for offensive purposes, it took on a new character . . . the enterprise became henceforth essentially a military expedition." [41]

[38] U. S. *v.* Hughes, 70 Fed. 972, citing Hall, International Law, p. 609; see also Wiborg *v.* U. S., 163 U. S. 632, 653–654.

[39] See Hall, International Law, p. 607.

[40] U. S. *v.* Murphy, 84 Fed. 609; U. S. *v.* Nunez, 82 Fed. 599.

[41] U. S. *v.* Hughes, 70 Fed. 972.

3. THE QUESTION OF JURISDICTION

It is only from the standpoint of the particular states affected that expeditions are considered unlawful. They are not of the nature of piracy, to be repressed by all states wherever found. But for every attempted hostile undertaking of this sort some state is charged in a measure with responsibility. Its responsibility is dependent on the fact of the connection of the expedition in some way with its territory, or the commission of some act within its jurisdiction over which it may be presumed to have had control. Therefore, in the view of that state, only those expeditions are unlawful which are carried on from its territory, or which have been prepared through the use of its resources and under the protection of its jurisdiction.

The extent of the action necessary to be taken within its jurisdiction in order that the government will take cognizance of the expedition as a violation of its law, or as an undertaking for which it must assume responsibility, is only so great as the exigencies of prevention demand. The inception of the conspiracy, and the formation of plans and organization may have occurred in some other country than that from which the expedition finally sets out. The individuals may have associated in a foreign country for the purpose of carrying on an expedition from this. But if they have made use of this territory, the government must take steps to thwart their purpose. In 1817, a number of foreigners enlisted or engaged in Holland to join the revolutionists in South America, and embarked for the United States with their military equipment, intending to obtain passage from this country to the scene of operations. They arrived under the command of a leader who exercised the authority of a commander during their stay at Philadelphia. He ordered them to a place of rendezvous, and drilled them. When they were about to depart, the boat in which they had taken passage was stopped by admiralty process, and the members of the expedition were held for trial. The court decided that in such cases the state is compelled to assume responsibility if the expedition is allowed to depart from its shores.[42] It is possible, of course, that the other state, if found negligent in the matter, could also have been held responsible. But the liability

[42] Ex parte Needham, 1 Pet. C. C. 487 (Fed. Cas. 10080).

of the United States would be in no wise diminished. It is under obligation to prevent the use of its territory and resources, whether by citizens or by aliens; and expeditions elsewhere organized cannot be allowed the privilege of a protected position within its jurisdiction for the furtherance of their enterprise.[43]

The actual contact of the members or elements of an expedition within the territory of the responsible state is not indispensable.[44] It is easily possible that the unlawful organization may be otherwise effected. When a body of men depart with a common objective point, and acting in coöperation, some previous preparation is almost to be presumed. The ability of the members to assemble beyond the limits of the state is in itself an evidence of prearrangement within the state. It will matter little whether the men have actually met, or have acted entirely through the intermediation of their common leaders, provided only the expedition was set on foot within the state which is charged with its prevention. Members of many expeditions held unlawful departed as passengers, and frequently the arms and the men were sent out from different ports. It is not to be expected that expeditions will depart openly and with no attempt to conceal their real purpose. To depart as individuals and meet beyond the boundaries of the state is a common ruse to evade the officers of the law. If the entire law of prevention is not to be nullified, the government must prohibit and punish these expeditions though the actual combination occurs beyond the ordinary range of its authority.

While the authority of the state is thus extended to cover undertakings originated abroad and finally formed abroad, it is always necessary that in some way the expedition shall have been put together within its jurisdiction. Since the entire enterprise need not have been prepared within a single state, the place of the occurrence of any particular part of the undertaking is immaterial. But some preparation must have been made in the particular territory in question in order that some ground for the state's interference may be established. There will need to have been an enlistment of men, the acquisition of equipment, the perfection of plans and organization, the training or drilling of the men for service,

[43] Charge to Grand Jury, 5 Blatchf. 556 (Fed. Cas. 18264).
[44] U. S *v.* Murphy, 84 Fed. 609.

or such other things as will offer the possibility of governmental repression. Only then may the expedition be said to have been set on foot within that territory.

4. ACCESSORY CONDUCT

In general, the same rules are applied to the action of accomplices as to that of direct offenders. Since the efforts at prevention of these enterprises are directed largely toward the preparations for hostilities, those who are to be direct participants in the attack or invasion cannot easily be separated from others indirectly concerned. The state would find prevention impossible if it attempted to punish only those who were to engage in the actual fighting. Those who provide or prepare the means for an expedition are in fact the real offenders at municipal law, whether they are acting as principals or accomplices. For they commit the abuse of the territory and resources which the state is under obligation to prevent. Therefore, the law of the United States regards the accessory as equally guilty with the member of the expedition and imposes the same penalty upon him.

Where contributions of money, arms, or other provisions have been made, the hostile purpose is very apparent. These are things which will be a material aid to the expedition and will add to its chance of success. These and other things which tend to forward the enterprise and make it possible show on their face such collusion as to involve the contributor in the designs of the direct participants.[45] But in testing a given situation to determine whether or not such collusion exists, we may not rely entirely on the fact that assistance is rendered. The final question of guilt or innocence turns here, as in the case of principals, on the fact of intent.

Difficulties will most often be presented in the case of vessels furnishing transportation to an expedition. Vessels engaging in hostilities are, of course, considered as part of the enterprise. But more frequently ships are employed merely for the transportation of the men to the scene of their operations, or of arms for the use of the expedition. The officers of a vessel so used can only escape the charge of intending to forward the

[45] Charge to Grand Jury, 4 Wkly. Law Gaz. 214 (Fed. Cas. 18268). Same, 5 McLean, 306 (Fed. Cas. 18267).

enterprise if the destination and unlawful character of their cargo was unknown at the time of embarkation.[46] Mates of a vessel, sailing from a port of the United States, which had transported an expedition contrary to law, were held guilty of no offense if, at the time of sailing, they did not know that the vessel was to carry an expedition, and did not learn the fact, until they met, beyond the three mile limit, another vessel containing men and arms.[47]

The owner of a vessel so employed is equally guilty if he provides her for that purpose, or has knowledge of the use to which she is to be put.[48] In the case of Hart,[49] the defendant was president of a company owning a ship which carried men, weapons, and military supplies from a point off Barnegat to the island of Navassa. The court instructed that to have so provided the means of an expedition with knowledge of the character of the undertaking was contrary to law.

Whether or not the officers of a ship may escape responsibility entirely in case an expedition is taken on unwittingly, and its unlawful character only discovered after sailing, depends upon the absence of the fact of subsequent collusion with the members of the expedition. For instance, the master of an American steamship took on board, after leaving port, men and arms, not being at that time to all appearances a military organization. But during the voyage, the men were allowed to take the arms and continue their preparations by organizing and drilling as though for warlike maneuvers. These facts were considered evidence of the collusion of the master of the vessel, who was held for trial as an accomplice.[50]

It is immaterial in any case that the assistance so furnished continues during only a part of the voyage. Frequently expeditions are transshipped at an intermediate port to escape detection. But transportation during only a part of the course does not differ in the matter of illegality from transportation during the whole journey, though perhaps more often in the former case the master of the vessel may be unaware of its destination and unlawful purpose. So in the case of Hart,[51] the expedi-

[46] Hart *v.* U. S., 84 Fed. 799; U. S. *v.* Hart, 78 Fed. 868; U. S. *v.* Rand, 17 Fed. 142.
[47] Wiborg *v.* U. S., 163 U. S. 632.
[48] U. S. *v.* O'Brien, 75 Fed. 900.
[49] U. S. *v.* Hart, 78 Fed. 868; Hart *v.* U. S., 84 Fed. 799.
[50] U. S. *v.* Hughes, 75 Fed. 267.
[51] Supra, note 49.

tion was transferred at the island of Navassa to another ship which then proceeded with it toward Cuba. But the knowledge of the one that provided the first ship, of the final destination of the men was sufficient to convict him.

Where assistance is secured through compulsion, no collusion may of course be presumed. An accomplice is a voluntary assistant in a crime. In admitting the testimony of witnesses in the case of an expedition across the Mexican border, those who claimed they had been captured and compelled to join the expedition under pressure of force and threats of violence were not regarded as accomplices.[52]

There appears to be no obligation on the part of one country to punish persons for assistance rendered to expeditions proceeding entirely from other countries. The existence of an expedition is a necessary condition precedent to the existence of accessories. When the fact of an expedition is a matter beyond the power or province of the government to ascertain, no expedition exists in the view of the law. It will then have no obligation to prevent the action of accomplices. To convict of providing the means for a military enterprise, it must be proved that the enterprise was organized in or carried on from the country, as well as the fact that some one was preparing the means for it.[53] In 1891, during the Balmaceda revolution in Chile, arms and ammunition were purchased in the United States, and were sent away in the armed transport of one of the parties. While this was perhaps not clearly a commercial venture, the expedition, if there was such, could not be said to have been carried on from the United States.[54] Likewise, contributions made directly to armed forces in a foreign country are not within the prohibition of the law. For however much such donations may further the hostilities, they are not contributions to expeditions actually put together in or carried on from a friendly state.[55]

But once the fact of the expedition is established, then any action over which the state has control, or the action of any person over which the state has jurisdiction is unlawful if it contributes to an offense, even

[52] U. S. *v.* Ybanez, 53 Fed. 536.

[53] U. S. *v.* Hart, 78 Fed. 868.

[54] U. S. *v.* Trumbull, 48 Fed. 99, 103; see also U. S. *v.* The Itata, 49 Fed. 646; and the case of The Wahlberg, For. Rel. 1895, II, 867–876.

[55] H. Ex. Doc. 74, 25 Cong. 2 Sess. p. 7.

though it takes effect beyond the boundaries. When the captain and mate of a vessel, knowing the character of their cargo and its intended purpose, had transported arms from a port in the United States to a foreign port together with men and stores to be used in a military expedition from this country, they were found guilty of a violation of the law.[56] The taking on board of expeditions on the high seas is an oft-repeated offense of this sort. On returning within jurisdiction, the officers of the vessel are liable to prosecution and punishment as though their act had been completed within the territorial waters.

5. THE CONSUMMATION OF THE OFFENSE

Inasmuch as the state is most largely concerned with the attempts at setting on foot expeditions, it is necessary to consider how far the individual must have gone before the government will take cognizance of his action as unlawful.

Though the fact of a hostile intention is usually a point most difficult of proof, it occasionally happens that the unlawful purpose of some person is openly declared. When this occurs in the absence of any positive evidence of its substantial nature, as is generally the case, the question arises as to whether or not the intent in itself constitutes an offense within the meaning of the law. On this point, however, there can be little controversy. The intention to commit a crime is not *per se* a crime. "Mere words, spoken or written, though indicative of the most determined purpose to do the forbidden acts, will not constitute an offense." "The offense is not complete without some overt or definite act." [57]

Of more frequent occurrence has been the revolutionary agitation within the United States against other countries, unaccompanied by any declaration of hostile purpose. Organizations have been created for the purpose of stirring up or fostering rebellion abroad. Notorious among these have been the "revolutionary aid societies" and "immigrant associations" of the Irish, and the Fenian brotherhood. They have been

[56] U. S. *v.* Rand, 17 Fed. 142.

[57] U. S. *v.* Lumsden, 1 Bond, 5 (Fed. Cas. 15641). See also S. Ex. Doc. 57, 31 Cong. 1 Sess. p. 48.

a source of trouble for the United States with other countries; and the inability of the government legally to suppress them has made more difficult the performance of international duties.

In 1885, Mr. Valera, the Spanish minister at Washington, directed a note to the Secretary of State in which he seemed to hold it "the duty of a government to repress outward manifestations which may result in overt violations of the law." [58] But the Government of the United States refuses—in fact it has not the power—to interfere with expressions of individual opinion unless some overt act accompanies the opinion which it is desired to punish. "We do not punish such proceedings until the spirit of interference which induces them reaches its natural consummation, that of attempts to interfere in the affairs of a foreign country by force." [59] The Robert Emmett Club of Cincinnati (1885) was an organization having for its object the overthrow of the English Government in Ireland. It undertook the uniting of all Irishmen in America for this ultimate purpose. But the members confined themselves entirely to moral agitation, and were guilty of no overt act which would justify their punishment. It was therefore impossible to suppress their activities.[60] In connection with the Fenian expeditions from the United States into Canada, this government maintained that it had performed its full duty in repressing only overt acts, not denouncing the disturbers while they confined themselves to moral agitation.[61]

The consummation of the offense, then, is the commission of an overt act. It is the taking of the first definite steps in the enterprise, "providing the means for the expedition, furnishing munitions of war or money, enlisting men, and, in short, doing anything and everything that is necessary to the commencement and prosecution of the enterprise." [62] It is simply some definite act which leads to an attempt at forcible interference in a foreign territory. It is obvious, of course, that these acts must be sufficient to show the intention to set on foot an

[58] From the reply of the Secretary of State, Mr. Bayard, For. Rel., 1885, 776.

[59] Mr. Cushing, At. Gen., to Mr. Marcy, Sec. of St., Dec. 2, 1856, 8 Op. At. Gen. 216.

[60] U. S. *v.* Lumsden, 1 Bond, 5 (Fed. Cas. 15641).

[61] Dip. Corres. 1865, II, 103; 1866, I, 77.

[62] Charge to Grand Jury, 5 McLean, 249 (Fed. Cas. 18266).

expedition,[63] for otherwise an essential factor of unlawful action would be lacking. But given the hostile intent and the overt act, the actual setting forth of the expedition is an unimportant question in the prosecution of the offenders. The inception of the expedition is a violation of the law.[64]

Chapter III. International Distinguished from Municipal Phases of the Law

1. Bearing of the municipal on the international law

The definition of unlawful conduct which has formed the basis of the practice of the United States is set forth in the municipal law. As we shall see presently, individuals are only indirectly parties to the international delict. In one sense, therefore, the law applied to them can be none other than municipal. But we shall find also that only through their action is an occasion for the international delict created, and that their conduct may have international consequences.[65] In another sense, then, the law governing their conduct is international. It is for the purpose of controlling the relations of the citizens of one state with another state, and it has important effects in the relation of government to government. This law, consequently, tends to conform to the requirements of international obligations, and thus to express the law of nations which has called it forth.

Reference has previously been made to the fact that the law on hostile expeditions, adopted by the United States, originated in the development of foreign relations.[66] The offense it purports to prohibit is an aggression against a foreign government, and, in the application of the law, the direct interest of the government has seldom been other than the preservation of peaceful relations with other states. While, therefore, the special relation set up by this municipal law is one of the state and its subject, it arises out of the efforts of the state to make the conduct of its subjects conform to the requirements

[63] Charge to Grand Jury, Fed. Cas. 18265.
[64] U. S. *v.* O'Sullivan, Fed. Cas. 15975; U. S. *v.* Ybanez, 53 Fed. 536.
[65] Infra, sec. 2.
[66] Supra, I, 1.

of international obligations. This fact has appeared in the discussion given to the various principles applied to individual conduct. Nevertheless, if this municipal law has in fact departed from the strict necessities created by the law of nations, in so far as it has, it must be regarded as of only local validity. It may be intended to serve the ends of local regulation as well as international, but its effect in the fulfillment of the state's obligations must be in conformity with international law if its principles are to be acceptable to other states.

The international significance of the distinctions between lawful and unlawful conduct of citizens or subjects appears when they are considered from the standpoint of interstate relations alone. The United States interferes with the conduct of individuals only upon evidence of their hostile intention. It is obvious that the interests of other countries will not demand the restraint of undertakings not directed toward an offense against them; that is, of undertakings in which there is no hostile purpose. Conduct in which that purpose is lacking is ordinarily not objectionable to the foreign state, and is, consequently, not prohibited by international law. The duty of prevention requires the repression of attempts at and preparations for hostilities only. It is difficult to form a statement of the duty which does not involve the idea of a hostile design or intention. Therefore while any state may employ its own methods in the performance of its duty, and may prohibit whatever acts it chooses for the purpose of forestalling expeditions, it will find no warrant in international law for interfering with other acts than those which are coupled with an intention of attacking a friendly state. Any rule of prohibited conduct which may possibly fail to include all undertakings so intended falls short of the requirement of the international obligation.

The only evidence which is material to the proof of an internationally forbidden act in the preparation of an expedition is that which establishes the intention subsequently to commit hostilities. The immediate acts are not in themselves a test of innocence or guilt. It is only the evidence of the ultimate purpose of these acts which establishes the duty of the state with regard to them.

The absence of the unlawful purpose, in absolving the individual, at the same time frees the state from culpability. The lack of any evidence of hostile intent is the most complete defense of the state charged with

failure in the performance of its duty. When the United States decided, in the case of the transportation of arms and men to France during the Franco-Prussian war,[67] that there was no evidence of such hostile purpose on the part of the persons concerned as would justify interference, it in fact decided that no international delinquency would be occasioned by the refusal to prevent their departure. The intent of the individual is thus first to be proved in order to establish a possible liability on the part of the state. Whatever further is necessary to fix that liability, this much is requisite. The rule of hostile intent is, therefore, consistent with the international obligation and with the law that creates it.

The law of the United States considers an expedition to be an organized body of men capable of military action. But even these qualifications of the term are so construed as to include any number of men, in whatever manner organized, which could commit that offense against a friendly state which the government is bound to prevent. Thus construed, the rule of the municipal law becomes definitive rather than restrictive. It specifies the prohibited undertakings without excluding anything demanded by the general law.

Only those expeditions are punished which proceed from the United States. In other words, the United States denies its responsibility for all expeditions not set on foot within or carried on from this country. This fixes the liability of the state as well as the subject. The chief purpose served is to distinguish between unlawful conduct for which the state is internationally responsible and that for which it is not. It is by this rule that the connection of the government with the offense in question is to be ascertained. The rule is in such agreement with the principles of state responsibility that its validity as well as international application is evident.

There has been no interference with suspicious enterprises by the government of the United States until some overt act has been committed. Since the completion of the internationally forbidden act is effected entirely beyond the jurisdiction of the state attempting to prevent it, it is necessary for that state to fix the point beyond which its subjects may not go with impunity. This is primarily a municipal regulation, since it is only for the purpose of facilitating the

[67] Supra, II, 2.

execution of the law. It does not purport to define in any sense the offense which is forbidden nor the extent of the state's responsibility. It establishes only that point at which the government will take cognizance of conduct suspected of being unlawful in its character and purpose. The question as to how far expeditions shall be allowed to go, or how complete an organization may be effected, before there shall be interference, is a matter entirely for the state within whose territory the acts are taking place. It is a question of expediency in the prevention of expeditions.

It is not to be denied, however, that the preparations for expeditions are of international concern. Foreign governments are more desirous of the prevention of undertakings which may cause irreparable damage to their country than of the enforcement of the liability of a delinquent state. Their representatives frequently protest against the seeming negligence of the government in respect to preparations for unlawful enterprises. In this they are entirely within their right, but the legal consequences of their protests are extremely limited. The duty of the state against whose inactivity the objections are made is the prevention of hostilities rather than the prevention of preparations. The extent of the restraint exercised within its territory need be only that which is sufficient to the fulfillment of the duty. No liability is incurred unless there is failure,—unless forcible acts are in fact attempted against another country. Failing in that duty, there is no doubt the state will find its defense the more difficult and its liability the greater if it appears that it negligently delayed its preventive measures, or refused to take cognizance of alleged unlawful acts. The foreign government is concerned, therefore, with the rule as to the commission of an overt act in so far as this rule may be urged as a defense or the overt act as an evidence of delinquency. But it can have no right to require that action be taken against individuals at any particular stage of the proceedings, neither at the time the hostile intent is first suspected, nor after preparations have begun.

Consequently, while it is necessary that action be taken at some time during the setting on foot of an expedition, it cannot be said that the rule applied by the United States is based on international law. That law makes only the general requirement that cognizance of expeditions

be taken in sufficient time that the power of prevention may be effectively exercised. On the other hand, the rule of the municipal law is in ample fulfillment of that requirement.

2. THE RELATION OF THE INDIVIDUAL TO THE LAW

Individuals are not persons in international law. The law binds states only. It deals, it is true, with the rights and duties of citizens and subjects. It guarantees them privileges, and imposes limitations upon their conduct. Thus they become the subjects of international laws. But they are not parties to the law in the sense that their rights and duties may be personally enforced through its remedial processes. Whatever rights they enjoy under it belong to their sovereigns, and whatever obligations are imposed upon them are enforced through their own government, or with its acquiescence. Consequently, while a state may be bound under the law of nations by the duty of abstention from interference in the affairs of foreign states, its subjects are not bound in the same manner by the same law.[68] It is for that reason that the state is given the further duty to prevent like interference on the part of private persons. This added obligation is likewise limited to the state on which it is imposed. It does not, *ipso facto*, create a corresponding duty on the part of the citizen. So far from his having a duty to another state, he is free, for all the international law affects him, from any responsibility to his own state for such objectionable conduct. That responsibility can be created only by municipal law. Though international law indirectly renders his act unlawful, it is only unlawful in the sense that it must be prevented. If the offender is to be punished for his act, it must be done through some municipal law applicable to him, at the hands of a government having jurisdiction over him. If the state chooses to regard the individual act as lawful, there is no power to regard it as unlawful, within the sphere of that state.[69] For the effect of the international law is not to impose obligations on private persons but only on the state itself, and to compel it to assume responsibility for objection-

[68] Wharton, Criminal Law, sec. 1901. See convention relative to the creation of an international prize court, Hague Peace Conference, 1907. Article 4 allows an appeal to the court by individuals directly in some cases.

[69] 7 Op. At. Gen. 367, 381 (in connection with enlistments).

able private acts. From the standpoint of an offended state, it is the failure to meet this obligation that gives ground for international action; and the offense of the individual is dealt with by it only through the local law. Properly speaking, there cannot be a violation of international law on the part of an individual.

The members of a hostile expedition are, however, ordinarily offenders against the states concerned with their undertaking. It is, of course, conceivable that the state within whose territory the expedition originates might attempt the frustration of its designs without regarding the enterprise as unlawful.[70] But so long as the expedition remains under the control and within the jurisdiction of that government, its only offense will be against the local sovereign. As against this state, it may be regarded as offensive from more than one view-point. It may be regarded, in the first place, as having injured a friendly state; and the individuals will be punished by the government in behalf of the one they would have attacked. In the strict theory of international law, this would seem to be the proper conception of the offense. The act is regarded as criminal because of the injury which might be done to a friendly country, and out of international considerations the government punishes the offenders.[71] In the second place, they may be punished in the interest of their own state primarily; because it is necessary to the maintenance of orderly and peaceable foreign relations and the fulfillment of the state's obligations. The citizen is not permitted to hazard the peace and safety of his own state by any aggressions on another for whatsoever reasons they are undertaken.[72] The crime is thus considered as consisting in acts which involve the government in difficulties.[73] In addition to these aspects of the offense, most states, no doubt, regard such conduct as destructive of the domestic tranquillity.[74] Furthermore it is in derogation of the sovereignty of the state, and in contravention of the sovereign will. Aside from the statutory offense, unauthorized acts of war are a violation of the national jurisdiction.[75] To declare and

[70] This was the case before the enactment of the Neutrality Act of 1794.

[71] This is implied in the statement of the statutes of the U. S., and England. See Chap. VI, sec. 1.

[72] Fillmore, Annual Message, Dec. 2, 1851, Richardson, Messages, V, 113, 115.

[73] This is implied in the statements of European legislation. See Chap. VI, sec. 1.

[74] U. S. *v.* The Three Friends, 166 U. S. 1; For. Rel. 1886, 57.

[75] Ibid.

carry on war is a fundamental prerogative of the sovereign; and the attempt on the part of citizens to exercise the power is essentially unlawful. "No citizen has a right to go to war on his own authority . . . . indeed nothing can be more obviously absurd, than to say that all the citizens may be at war, yet the nation at peace."[76] These acts must, consequently, be prohibited as a mere matter of internal administration, if nothing more.

From whatever standpoint the nature of the crime is considered, its punishment is entirely a local affair. A foreign government cannot be regarded as a party to an action against the individual, beyond its jurisdiction.[77] The acts thus punished are forbidden to the individual only by the municipal law, and, legally considered, his offense is committed against only the one state. Another government can concern itself in the matter only by diplomatic representations.

On coming within the jurisdiction of the state against which they intend to wage war, the members of an expedition are at once subject to the municipal law of that state. If they come to be recognized as belligerents, they are, of course, subject to the special laws of war, and they may receive the special privileges accorded to belligerent parties. But aside from this limitation, the state they attack is free to apply the penalties of its own law to them. They are regarded, personally, as offenders against it. The nature of their crime will be defined by its municipal law. Ordinarily the common criminal statutes are sufficient for this purpose. The expedition will, perhaps, have taken lives, destroyed property, or committed other acts of violence in the nature of common crimes. Or they may have attempted to usurp governmental authority in a treasonable way. Thus they become criminally liable to the offended state, and are subject to such just and reasonable punishment as the government may choose to inflict upon them.[78] They are now offenders against this state and it alone; and in dealing with them there need be no account taken of their origin in another country.

[76] Mr. Jefferson, Sec. of St., to Mr. Morris, Min. to France, Aug. 16, 1793, American State Papers, For. Rel. I, 167, 168.

[77] For. Rel. 1885, 776, 778.

[78] For instances, see Chap. VI, sec. 2. Being a political offense, it affords no ground for extradition. (Wharton, Criminal Law, sec. 1908.)

On the other hand, the protection afforded to inoffensive citizens abroad makes it very important that there be no interference with suspected parties until some real offense is at least imminent. There can be no complaint against organizations whose activities are confined to the country of their origin. We may take this a step further: the departure of an expedition is not in itself an offense. It must appear that there has been committed a distinct wrong against the state in question in addition to the mere fitting out of the expedition. The undertaking must have arrived at the point where some attempt at forcible interference has been made. In observing this condition, the state which is to be the object of attack may, no doubt, take preventive measures for its protection. It need not await the direct attack of the offenders, but may act whenever their purpose is apparent. But it could not proceed to the punishment of the members of the expedition as though they had completed their anticipated offense.[79] It must have regard to the extent of their wrongdoing. And if the state has deemed interference necessary while there still remained a *locus pœnitentiæ* to the individuals involved, it is questionable that any punishment may be inflicted.

It is important thus to determine the position of the individual under international law, and the nature of his offense against the local law, in order to arrive at the distinctly international phase of the subject. This latter is a matter primarily of the relation of states. But the individual action does bear a relation to the international offense which is not to be neglected. The carrying on of hostile expeditions is the situation which the law is designed to remedy; it is the whole concern of the international law in that particular. This law has no occasion to be applied until the personal offense has been committed or attempted. The setting on foot of a hostile expedition creates the situation which gives rise to the international obligation. It is a fact always first to be proved, and the guilt or innocence of the individual is the first fact to be considered in the evidence of an international delinquency.

But while the expedition is a necessary fact precedent to the delinquency of the state, the relation of the two facts is not that of cause and effect. The international delinquency does not follow, *ipso facto*, from the expedition. Some added act or failure to act on the part of the state

[79] 8 Op. At. Gen. 216; S. Ex. Doc. 57, 31 Cong. 1 Sess. p. 48.

is requisite. While the fact of the expedition is a necessary condition, there is further to be proven the actual delinquency of the state itself.

That there is any relation at all between the individual act and the international duty of the sovereign arises in this case out of the fact that the territory and resources of the state, over which the sovereign is supposed to have complete control, have been used to the disadvantage and injury of another state. If only the immediate attack on the foreign country be considered no international consequences result; for the government is not responsible for citizens beyond its control. But in connection with their acts which injure other nations while the citizens are within the control of the sovereign, the government does have an international obligation. In this case, it is the use of its territory and resources, and the abuse of its protection, for wrongful purposes that renders the state liable for the subsequent hostilities. From the standpoint of the citizen, that is an act against his own government. But internationally considered, it is the fact that connects his state with the attack on the neighboring state. In this way the citizen involves his country in his offense; he makes it a party to the act by the use of its property, or through receiving its protection for his unlawful enterprise. Thus the two states are brought into conflict, an international obligation is involved, and, so far as it fails in meeting that obligation, the sovereign itself becomes an offender.

3. THE INTERNATIONAL DELINQUENCY

Whenever the state itself becomes a direct party to the carrying on of a hostile expedition, it is, of course, directly liable to the offended state. The expedition itself is then the immediate international offense, and the government is compelled to assume full responsibility for the enterprise. The participation of the government destroys the semi-private nature of an expedition, and it becomes a public undertaking. It is in such cases that the original and direct responsibility of the state is most evident. But they can occur only when the state has acted through its government or agents. Expeditions so carried on are, in fact, acts of war on the part of the state, and are removed from the category of peace-time aggressions. We are directly concerned, therefore, only

with unauthorized expeditions, and with the responsibility of the state for them.

The international law, in creating an obligation to prevent hostile attacks on other states, establishes a presumption of responsibility for those attacks that are not prevented.[80] The sovereign state is considered to be able to control the use of its territory; it is presumed to have the power to prevent hostile expeditions. Its failure to prevent is, therefore, regarded as a refusal to exercise that power; and for this the state is responsible. But this is a presumption which may be overcome. The control of private conduct is not as absolute in fact as in theory. The state may have ample power, and have diligently sought to exercise it, and yet may fail to accomplish the object enjoined by the law. Its responsibility may, consequently, be rebutted if the difficulties in the way of the prevention of an expedition were so great as to make it impossible, or to require a greater exertion than was warranted. There is then no delinquency and no liability.[81]

The responsibility which a state does incur through failure to prevent expeditions under other conditions is a direct responsibility. That is to say, in case of a failure through some fault of its own, it has incurred not merely a vicarious responsibility for the acts of the individuals involved, but is itself guilty of an international delinquency. This follows from the fact of the definite duty of prevention. This duty would mean nothing if it might be performed by such subsequent action as is otherwise demanded in satisfaction for individual misconduct. If the responsibility were purely vicarious, the practice with regard to hostile expeditions would be confined entirely to the punishment of offenders and to securing reparation by them, or at most to voluntary prevention. The obligation, not being directly enforceable, would give no right of action against the negligent state. A failure would then not amount to a delinquency, and there could be said to be no legal duty of prevention. It is true, the state may prefer to meet its responsibility in the matter by redress to the offended state. But the responsibility it assumes is for its own delinquency, and must be met in addition to any vicarious responsibility it may otherwise normally have.[82]

[80] Charge to Grand Jury, Fed. Cas. 18266.

[81] Infra, Chap. IV, sec. 2.

[82] Charge to Grand Jury, Fed. Cas. 18266. See also the cases submitted to arbi-

The direct liability of the government concerns only the conduct of expeditions while within its own jurisdiction. Whether or not it has been guilty of delinquency in the prevention of an undertaking, it is not considered an offender at international law by reason of the subsequent conduct of the individuals involved. The state is, however, under a relative responsibility for their actions which injure another country. Though it is not itself compelled to make reparation, nor secure satisfaction to the wronged state, it is required to deal with the offending parties as circumstances will permit to compel them to redress the wrong done or pay the penalties of the law. Because the injury done is usually not such as may be repaired by the individual offenders, the infliction of criminal penalties is all that is demanded.[83]

The state itself becomes directly responsible again if it refuses or neglects for any reason to meet the just requirements of its vicarious responsibility. The nation then becomes a party to the wrong, and direct reparation may be demanded of it in lieu of the private persons.[84]

Expressed thus negatively, the wrong committed by the state is a failure to meet a certain international requirement. That, we have considered the real offense at international law, and have excluded private offenses. But when viewed positively, the wrongful act of the state appears to consist in complicity in hostile attacks on friendly states. The authorized and direct complicity of the government in the expedition itself has been excluded as actual war. The negligence and carelessness of the state, however, in the prevention of such enterprises amounts to virtual complicity in the undertaking. If there is such an attitude on the part of the government as indicates a disregard of its international obligation, it may be considered as having consented to the attack which is to be made; it may even be regarded as assisting in the hostilities by protecting the persons engaged, and allowing them its territory as a base for organization. If the sovereign has knowingly suffered the harm to be done to another state, it may be said to be an accomplice in the act itself.

tration, referred to in Chap. VI, sec. 2. For the means of enforcement of the direct responsibility, see Chap. V.

[83] See infra, Chap. IV, sec. 2.

[84] Charge to Grand Jury, 5 McLean 306 (Fed. Cas. 18267).

The reception of offending individuals after their crime has been committed is likewise an act of complicity. It is often as essential to the success of the enterprise that retreat be afforded the participants as that they be sheltered or aided in the preparation of their undertaking. The government of the state receiving them consents to their offense after the act, and furnishes them aid or protection. It offends thus by complicity after their act as well as by complicity in the beginning.

The international delinquency is the act or omission of a state in complicity with a hostile expedition, or in disregard of the international obligation to prevent hostile attacks on friendly states.

ROY EMERSON CURTIS.

[This article will be concluded in the next number of the JOURNAL.]

TWO REPRESENTATIVES OF THE GROTIAN SCHOOL

The growth of international law, both in precision and in scope, has been one of the marked features of the general development of law in the nineteenth century. It is true that even at the present day the reproach is often cast upon international law that its content is unsettled, its authority vague, and its method unscientific. But one has only to compare the standard text-books of the present day with the treatises that were quoted as authorities in the beginning of the nineteenth century to realize the great progress which has been made towards the establishment of international law upon a truly scientific basis. It cannot fairly be expected that international law should have as yet attained, or shall in the near future attain, the precision and definiteness of municipal law. The last decade of the century did indeed witness the first sitting of an international legislative body in the form of a conference at The Hague, which enacted what may be called international statutory law. But apart from the fact that this body was composed of the representatives of independent, not of federal, states, and therefore its rulings could not be final, the subject-matter with which it dealt was in many cases not such as would admit of definition and analysis after the methods of municipal law. The states composing the family of nations present differences of physical, mental and moral characteristics far more marked than those exhibited by the individuals within a given state, and it is but natural therefore that it should be correspondingly difficult to codify in a precise and scientific manner the rules governing their mutual relations. But while the difficulties attending the codification of international law cannot be denied, there is reason to believe that the growth of international law during the twentieth century will proceed towards its appointed goal as steadily as it has done during the nineteenth century.

Side by side with the increase of definiteness in the rules embodying the practice of nations, there went a development in the theories concerning the nature and character of the rules of international law. Gro-

tius had drawn the distinction in 1625 between the natural law of nations and the voluntary law of nations. This distinction formed the very basis of his system, and from its adoption by the majority of the writers of the seventeenth and eighteenth centuries arose what has been called the Grotian school of writers. The system inaugurated by Grotius recognized the moral authority of the natural law over the existing practices of nations, and was to that extent purely deductive in character; but at the same time it was ready to infer from the universality of certain accepted customs, a proof of their conformity with the natural law, and was to that extent inductive in character.

In contrast with the Grotian school of writers, a school of which Pufendorf may be regarded as the leader laid chief stress upon the deductive elements of international law, regarding the law which results from the actual practice of nations as possessed of no authority whatever. On the other hand, another school, which has been given the name of the Positivist school, attached little or no weight to the natural law as a source of international law, but turned to the treaties and customs of nations as embodying the effective positive rules of international law. The Naturalist school of Pufendorf had, except for the publication of Lorimer's volumes on the Institutes of the Law of Nations in 1883–1884, practically ceased to assert itself during the nineteenth century, while the doctrines of the Positivist school came more and more into favor through the influence of such important works as those of Heffter, Phillimore and Hall. The Grotian school held its ground quite steadily, and while it had fewer adherents in Great Britain and Germany, it claimed the majority of the prominent French and Italian writers.

In 1894 appeared two important French treatises which are fairly representative of that recent school of writers who, while seeking to be practical in their treatment of international relations, at the same time do not lose sight of the theoretical principles underlying the rules of international law. Both of these treatises have recently appeared in new editions,[1] and although they differ somewhat in their estimate of

[1] Manuel de Droit International Public, par Henry Bonfils, Sixième Édition, Revue et mise an courant par Paul Fauchille. Paris: Arthur Rosseau. 1912. pp. viii, 1121. Cours de Droit International Public, par Frantz Despagnet, Quatrième Édition, Complètement Revue, Augmentée et mise au courant par Ch. de Boeck. Paris: Larose et Tenin. 1910. pp. vi, 1430.

the nature of international law, their general method and scope are sufficiently the same to make it possible to examine them side by side after a parallel method of criticism.

In order to determine what he calls the "basis of international law," Bonfils lays down the propositions that international law is rooted deeply and strongly in human nature itself, in the instinct and need which man has for progress and for the society of his fellows, and that the creative cause of international law is therefore to be found in the international community of organized states, while the occasional (accidental) cause is to be found in important historical facts, in the progressive development of civilization. After a discussion of the manner in which a sense of community of interests has grown up between states, Bonfils defines international law as "the law of a union desired and recognized by states, which maintain relations with other states in the interest of morality and justice, which consider these relations as indispensable to the needs of civilization, which recognize them as an integral part of a general order which the prosperity of humanity imposes upon them." [2] In conformity with this definition Bonfils asserts, with a reference to Holtzendorf, that the idea of international law supposes the concurrence of three elements: The coexistence of several autonomous states; the fact that these autonomous states maintain systematic and permanent relations with one another; and the agreement of these states to recognize one another as subjects of international law within the limits of their community.[3]

Having laid the basis of international law upon this *a priori* foundation, Bonfils accepts the definition of international law adopted by Grotius as being "at once the most simple, concise and exact." [4] *Theoretical* or *natural* international law consists of certain fundamental principles which human reason deduces by a necessary and logical process from the existence of a community of independent states. These principles are entirely independent of custom, and the obligations which they impose are negative rather than positive in character, consisting chiefly in the duty of a state not to violate the liberty, independence and honor of other states.

In contrast with *theoretical* or *natural* international law, there is *posi-*

[2] *Op. cit.* 5. [3] *Ibid*, 7. [4] *Ibid*, 14.

tive international law, which consists in certain accidental, variable and secondary rights and duties established by international custom or by treaties and conventions. Now it often happens that, owing to the selfishness and evil passions of states, the rules of positive international law are in conflict with the principles of theoretical international law. Positive international law is accordingly in a state of permanent evolution during the course of which theoretical international law furnishes the criterion or standard by which the rules of positive law are to be judged, and at the same time offers the means whereby gaps in the positive law may be filled up and improvements in it be prepared. The author thus ranges himself among the followers of Grotius, who constitute what he calls the *Eclectic* school of international law. This school offers a compromise between the extreme views of the Positivist school, on the one hand, and the school of Natural Law, on the other. It accepts the facts of international life as embodied in usage and treaties and subjects them to the test of analysis and criticism according to the principles of theoretical international law.

In contrast with the method of determining the basis of international law adopted by Bonfils, Despagnet looks first to the facts and then to the theories underlying them. He recognizes that a law between states is a necessary result of the relations which states by their very nature are inevitably led to maintain with one another; but instead of deducing certain abstract principles from that relationship, he turns first to the actual rules governing international relations and finds in the fact of their existence the implied consent of nations to abide by those rules. It is this *consent*, this voluntary adherence of states to the rules under which they live which constitutes the foundation of international law and gives to it a positive character.[5] Despagnet thus formally rejects the system of Grotius, Wolff and Vattel, which he denominates as an *a priori* and theoretical system built up without attention being first given to the rules actually observed. Theoretical international law being, he says, "historically subsequent to positive international law, it must be regarded not as a purely rational and *a priori* conception, but as the criterion of positive law already in existence."[6] "The true method," he continues, "is to observe the facts, that is to say, inter-

[5] *Op. cit.* 48–49.

[6] *Ibid*, 51.

national relations and the manner in which they have been regulated in the course of their historical evolution, which leads us to a knowledge of positive international law; then, by a process of scientific synthesis, to select the relations which appear to be sufficiently permanent and universal, so as to arrive at the formulation of laws expressing those relations." So far Despagnet would seem to belong rather to the Positivist than to the Grotian school. But there is a further step to be taken. Positive international law must be tested by a standard embodying the principles of theoretical international law. "Finally," says Despagnet, "and this constitutes the art of the international jurist, by the criticism of the results obtained in the positive law already in force and by the union of the general laws of international relations we may come to create particular institutions or rules of a character tending to produce better results from the point of view of the interests of states." [7]

It will be seen, therefore, that both Bonfils and Despagnet, in spite of the difference in their points of approach, recognize clearly the distinction between the rules actually in force between nations and the rules which should be in force between nations; between the law that is and the higher law to which it is desirable that the practice of nations should conform. Just what are the precepts of that law, neither has undertaken to determine. Nor is the determination possible except in a very general way. Bonfils, arguing *a priori*, refers us to the principles of the law of nature, and while it may be difficult to find an agreement as to the proper application of those principles, there are at least certain general conceptions of international right and wrong upon which all men are agreed. Despagnet, arguing *a posteriori*, proposes that an abstraction be made from the historical facts of international life, the result of which will be to furnish us with principles of international conduct. In either case we are brought back to a standard of international morality consisting of those abstract rules of justice which have been consistently proclaimed in principle by the consensus of the civilized world.

Both Bonfils and Despagnet agree in holding that international law is true law. Bonfils states clearly and forcibly the three objections brought by writers of the school of Heffter, Bentham and Austin: "Law, it has

[7] *Op. cit.* 51.

been said, supposes an organized supreme power which gives it life and which implies the coexistence of three authorities: A *legislator*, whose duty it is to formulate rules of law; a *judge*, whose duty it is to apply those rules to various individual cases; a police body, whose duty it is to execute the decisions rendered. Now, it is further asserted, no organization of this or of a similar kind exists between independent and sovereign states." In brief, there is "no code, no court, no police." [8]

In answer to the first of these objections Bonfils points out the distinction which must be made between the terms *droit* and *loi*, between what may be described in English as the unwritten or customary law and the statute law. It is undeniable that if law be limited to statute law, the so-called international law is not true law. But this would be to overlook the part which custom has played in the formation of written law; for custom is not only the chief source of national codes, but still constitutes in many countries a part of municipal law. In like manner Despagnet remarks that municipal law during many centuries of its early existence was generally customary; and he points out that the constitutional law of many countries, which is thoroughly positive, often consists merely of ancient traditions.

In answer to the second objection, that there is no court competent to give decisions in matters relating to international law, Bonfils shows that law is anterior to judicial decision, which presupposes it, and hence can not be an essential condition of it. Moreover, in many cases the rules of international law receive *incidental* application and interpretation in the decisions of municipal tribunals and particularly in the decisions of prize courts. Similarly, Despagnet points out that the absence of a judiciary merely proves that international law is in a state of imperfection, that it is passing through an early stage of its evolution, a stage through which municipal law itself passed without there being any doubt as to its positive character.

In answer to the third objection, that there is no organized public power to enforce respect for international law, Bonfils lays stress upon the *moral* sanction which brings its pressure to bear against violations of international law. "The attitude," he says, "of other states, the good offices of friendly powers, the official declarations of the diplomatic

[8] *Op. cit.* 10, 11.

body, the threats of powerful states, the verdict of public opinion pronounce upon the justice or injustice of claims made or acts performed." [9] In support of this Bonfils cites the coalitions of neutral states in 1780 and 1800, which forced Great Britain to withdraw her excessive claims, and the conduct of Germany in the Schnaebelé incident of 1887, as instances of the pressure of moral sanctions, the one of fear, the other of respect for public opinion; but it must be noted that Bonfils expressly repudiates the idea of war as a juridical sanction of international law. On the same point Despagnet shows that the sanction of public authority did not exist in the early stages of municipal law, and that while the sanction of international law may not be definite and organized, it is to be found "in the ordinary consequences of acts done in violation of the rules * * * of international law." These consequences may not appear immediately, but they are none the less certain to follow. "If we regard," he says, "the current of events taken as a whole and by long periods, we are struck with the evident harmony which exists between the respect for international law shown by nations and their prosperity, between their sins and the evils that have come upon them"; and he cites the answer made by von Ranke to the question addressed by Thiers to Germany after the fall of the Second Empire: "Upon whom are you making war?" "Upon Louis XIV." [10] In the words of Schiller, Despagnet tells us that "the history of the world is the world's court of judgment," and one is reminded of the words of the Latin poet:

"Raro antecedentem scelestum
Deseruit Poena pede claudo"

Retribution, though lame of foot, rarely abandons pursuit of the fugitive criminal.

Both of the treatises before us are so comprehensive in their scope and are so elaborate in their treatment of specific questions, and offer such a wealth of illustration upon the subject under discussion, that it is impossible to criticise them in detail. Perhaps an idea may best be had of their method in the treatment of practical questions of international law if we study the attitude of the two authors upon disputed questions towards which French writers have to some extent a national

[9] *Op. cit.* 12.

[10] *Op. cit.* 45–46.

tradition to follow, and with regard to which the French Government took a definite stand at the Hague Conference of 1907 and at the London Naval Conference of 1908-09.

It has always been a disputed question with writers of international law whether hostilities may be begun without the necessity of a formal declaration of war on the part of the belligerent states. All parties are agreed that it would be a violation of good faith between nations—and the principle of good faith is a recognized rule of international law—if a state were to deliver an attack upon its neighbor before the dispute between them had reached a more or less acute stage; but they are not in accord as to whether formal notice to the enemy must be given before the first blow can be struck. The school of the Grotian tradition has insisted upon one form or another of a declaration, and that in spite of the fact that the practice of nations during the eighteenth century, and the greater part of the nineteenth has been to the contrary. Bonfils treats the subject fully but somewhat inconclusively. He first argues *a priori* and offers as the chief reason for the necessity of a declaration the fact that "the peaceful relations existing between states make it necessary for them to warn one another that the state of peace has ceased to exist," that is to say, mutual confidence would be destroyed if hostilities could be begun without notice.[11] But this abstract argument is sufficiently answered by the fact that the strained relations existing between two states prior to war are in themselves a warning of danger ahead. A further argument that without a declaration of war the law of peace would still be in force and the troops of an invading army might be treated as bandits is too theoretical to call for comment. But in a later section Bonfils observes that "it is no longer considered indispensable to address the declaration *directly* to the government of the enemy state," and that "the form of the declaration is of little importance; what is of importance is the notice and statement of intention, and the precise determination of the date of the commencement of the state of war, since that state entails specific obligations upon the belligerents." [12] Does this imply or not imply that notice must be given to the enemy?

Despagnet's treatment is more satisfactory, but even he leaves us in doubt as to the precise point at issue. He argues that a preliminary

[11] *Op. cit.* 682.

[12] *Ibid*, 686-687.

notice before engaging in hostilities is required of a state in reason and equity in order to give an opportunity for a friendly settlement, in order to avoid the distrust in international relations which the possibility of an unexpected attack might give rise to, and in order to fix the precise moment when the rights and duties which a state of war imposes upon belligerents and neutrals come into effect.[13] These are admitted propositions. He then states that no formal procedure is necessary in declaring war, and that it is sufficient if war results from an explicit act, which may be found in a direct notice to the foreign government, or in the publication of a manifesto or in the presentation of an ultimatum. Despagnet vigorously combats the British and American doctrine that a formal declaration of war is unnecessary because the date of the commencement of hostilities is marked by the first act of aggression, holding that this doctrine authorizes attacks by surprise and creates a situation of distrust in international relations.

Both authors show a tendency to rely too much upon abstract reasoning and both seem to miss the practical points at issue. The object desired is that neither party to a war shall take the other by surprise, and if this duty of good faith be observed it is of little consequence whether the date of the opening of hostilities be marked by a formal declaration or manifesto or by the commission of a hostile act. Hall, who always keeps in touch with facts, argues convincingly that "no forms [of notice] give security against disloyal conduct, and that when no disloyalty occurs states always sufficiently well know when they stand on the brink of war."[14] At the Second Hague Conference an agreement was reached that hostilities must not commence between the contracting parties "without a previous and unequivocal warning, which shall take the form either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war." An effort was made to secure the adoption of a provision that hostilities should not commence until a definite period has elapsed after the declaration or conditional ultimatum has been issued; but it was thought that this provision would be an obstacle to military strategy, and the amendment was defeated. It is still possible, therefore, for one state to take another by surprise by issuing an unexpected ultimatum and following it up by an attack. But

[13] *Op. cit.* 812.

[14] International Law, 6th ed.

the possibility is somewhat remote. As Lawrence well observes, "neither states nor individuals can afford to stand before the world as open and unabashed villains. They assume a virtue if they have it not; and in the particular matter now before us the assumption of virtue means clothing unreasonable demands in diplomatic language and going through some sort of discussion upon them, that is to say, the very notice to the other side of its danger which it is the object of the Hague regulation to secure." [15]

Both authors treat in an admirable way the much disputed question of the character of contraband of war. Bonfils defines the subject with his usual analytical skill and shows, first, the provisions of treaties between separate states, next, the legislation of individual states, and then the doctrines of international jurists. He accepts, in contradistinction to the majority of French publicists, the British and American doctrine of absolute and conditional contraband, as well as the doctrine of "continuous voyage." [16] Despagnet, on the other hand, after a like careful analysis of practice and doctrine, distinctly rejects the idea of relative or conditional contraband, and considers the position taken by Great Britain and the United States on this point as violating the fundamental principles of neutrality. The point of view of Great Britain, he says, is that of a belligerent looking primarily to the protection of a belligerent's interests, whereas the proper point of view should be that of the neutral state whose commercial interests are not to be interfered with so long as it does not participate in hostilities by furnishing to a belligerent objects *the very nature of which* indicates that they are to be used in war. Despagnet likewise repudiates the doctrine of "continuous voyage" as tending to destroy the liberty of the seas by conferring upon belligerent states the right to paralyze the commerce of neutrals by condemning vessels upon mere suspicions.[17] The Declaration of London [Articles 30, 35] accepts the doctrine of "continuous voyage" with respect to absolute contraband and rejects the doctrine when applied to conditional contraband. Despagnet characterizes this compromise as unreasonable and unjust, although he says that "when one considers

[15] International Problems and Hague Conferences, 89.
[16] *Op. cit.* 994–1012.
[17] *Op. cit.* 1255–1274.

that this compromise was imposed upon the plenipotentiaries at London by hard necessity, it is intelligible."

On the law of blockade Bonfils and Despagnet both follow the French rule that a *general* notification, through diplomatic channels, of the establishment of a blockade does not render a ship liable to capture for breach of blockade unless the general notification be supplemented by a *special* notification made on the spot by an official of the blockading fleet. Bonfils argues in favor of the necessity of a special notification on the ground that "this notification is the sole method, which is at once certain and not arbitrary, of proving a knowledge of the blockade on the part of the neutral." [18] Despagnet justifies it because of certain theoretical inconsistences which he finds involved in general notifications, and because of practical difficulties in the enforcement of them.[19] Both authors seem to overlook the point that the French doctrine makes it possible for a neutral ship to make a first attempt to break the blockade without liability to capture. If a special notification were necessary in every case, a much larger blockading fleet would be needed than is required where neutral ships, having been warned of the blockade by a general notification, are restrained by fear from attempting a breach of the blockade. The objections raised by Bonfils and Despagnet seem inconsiderable, provided the general notification is supplemented by a special one in cases where the former cannot fairly be held to have come to the knowledge of the neutral ship. It is the abuse of the British and American doctrine in the interest of belligerents, not the proper application of it, which is at the bottom of the French rule. The Declaration of London [Art. 17] offers a compromise in the form of a provision that "neutral vessels may not be captured for breach of blockade except within the area of operations of the war-ships detailed to render the blockade effective." Thus neutral ships lose the opportunity to test the effectiveness of a blockade, while belligerents (British and American) abandon their claim to seize ships at any point on their intended voyage to a blockaded port.

The question of the desirableness of making private property of the enemy immune from capture upon the high seas offers an instance of the admirable manner in which Bonfils and Despagnet deal with proposed

[18] *Op. cit.* 1059. [19] *Op.cit.* 1009.

reforms in the rules of international law. Bonfils first gives an excellent historical sketch of the practice of nations, showing that the right of capture has been regularly exercised, except when voluntarily abandoned, as it was by Austria, Prussia and Italy in 1866. He then cites a list of resolutions either offered in legislative bodies or taken by commercial associations in favor of the abolition of the right of capture, showing to that extent the attitude of public opinion upon the subject. This is followed by a careful study of the opinions of statesmen and international jurists. British and American writers for the most part defend the practice, while German and Italian writers condemn it. French writers are to be found on both sides, the majority however being against the practice. After an array of arguments on both sides, Bonfils declares himself in favor of a modified form of the right of capture, according to which private enemy vessels would be subject to the rule governing private enemy property on land, namely, that they might be captured by way of requisition, subject to payment at the end of the war. The absolute inviolability of private property he considers "visionary and impracticable, in that it does not take into account the object and necessities of war." [20]

Despagnet furnishes a similar though briefer historical sketch, followed by an excellent résumé of the discussion of the subject at the Second Hague Conference, which he concludes by observing that, although an agreement was not reached, the discussions "leave the impression that a future understanding upon the subject is in no way impossible." [21] In a succeeding section he justifies the proposed inviolability of private property at sea by appealing to the well known but none the less convincing argument that war is a relation between state and state, and that the recognition of this principle contained in the exemption from capture of private property on land should logically be extended to the exemption of private property at sea. In answer to the objection of the advocates of the right of capture, that enemy commerce by sea is an element in the resources of the country, the destruction of which would tend to bring the war to a close, Despagnet asserts that "it is impossible to cite a single war in which resistance to the enemy has been actually overcome in consequence of the losses inflicted upon

[20] *Op. cit.* 866. [21] *Ibid*, 1071.

its merchant marine; in those wars in which the captures of commercial vessels have been most numerous, it has always been strictly military acts, victories over the land or naval forces of the enemy, which have brought about this result." [22]

It will be seen from the above illustrations that both authors are in touch at once with practice and theory, with historical fact and abstract principle, and that they are both not content with merely stating the law but are ready to criticize it when it appears to them to be based upon principles not consistent with international morality. In this respect the two treatises would, if translated, be a valuable addition to English and American text-books, which are generally more concerned with practice than with theory. The editors of the revised editions of the two treatises, M. Paul Fauchille for Bonfils and M. Ch. de Boeck for Despagnet, by the addition of valuable supplemental matter dealing with the results of the Second Hague Conference and the Declaration of London, have brought both works fully abreast of the times.

CHARLES G. FENWICK.

[22] *Op. cit.* 1072.

A PRACTICAL PEACE POLICY

The confusion of thought in which the modern world likes to dwell is nowhere greater than in those things which come within the survey of the peace movement. Even its most enthusiastic supporters are unable to show that their efforts have tended to make wars less frequent than heretofore. Neither can they prove that any nation has yet submitted a single question to arbitration over which it would have gone to war if the Hague Tribunal had not existed. They must honestly acknowledge that wars occur less often now than in the past, partly because a great number of questions, as, for example, those of nationality and of colonization, which formerly led to war have now, to a great extent, been solved, and partly because the civilized nations have reached such a stage in their development that they no longer are inclined to draw the sword for the comparatively unimportant objects for which they were unsheathed at a time when the death and ruin of thousands meant little to the government.

Yet, in spite of the diminution in the number of wars, the preparations for war steadily increase. Half a century ago the taxpayer everywhere paid his customary toll to the armies and navies with great reluctance. Regiments and ships led a very peaceful existence. Then came the three wars of Prussia. A great change came over the military classes. The national leaders, who mostly belong to the classes from which the officers of the fighting forces come, were induced to paint the colors of the international situation in the darkest hues. They called upon the military and naval expert, who gradually succeeded in so perverting the public press that today very few journalists are capable of dealing with international politics without attaching undue importance to things military and naval. Their superficial knowledge of these matters naturally leads them to all kinds of exaggerations. And so it has come to pass that the man in the street is at present everywhere fed with thoughts of ships and cannon, while the governments loudly disclaim all intentions of aggression. In the meantime, the number of persons

directly or indirectly dependent upon the maintenance of the war services constantly grows. The burden of taxation increases in leaps and bounds. The general discontent and restlessness threaten the existence of the privileged classes. The powers that be feel insecure. They look for the support of the existing order to the army and the navy, where timehonored discipline still overcomes the spirit of revolt. The monarchs clearly see that they can only keep their thrones by leaning on uniforms and sermons. They understand that they would seem ordinary mortals in case the war lords and the grand admirals should disappear with the archbishops and the lord chamberlains. Thus all sorts of parasites and sycophants are enlisted on the side that tries to turn the earth into an armed camp.

This in itself contributes to augment the number of the pacifists. Yet the mere fact that the increase of armaments grows in intensity, the more the latter make themselves heard, is a warning which deserves more than a passing consideration. In reality the double connection between the peace movement and the growth of armaments is perfectly natural. As long as the former places itself on a national basis it is bound to attack the national war interests. These have it is true, gradually become international, though with a vengeance. Shipbuilders, armor manufacturers, gun makers, torpedo engineers form at present a sort of international guild, whose interests know no frontiers and who control the most powerful organs of the international press. At the same time the feeling of professional comradeship is growing in all the armies and navies of the world. The officers now look upon each other with far more sympathy than they accord to the peaceful citizens of their countries. Against the pacifists of their own land they display a remorseless hatred. Before the common danger of the peace movement, whose success threatens them with annihilation, the different war interests are indeed obliged to clothe their fraudulent internationalism in the deceiving garb of militant patriotism. Thus the ultra-nationalist revival of the last two decades has really been brought about by the foolish way in which the pacifists have proceeded. The peace movement has as a matter of fact been pouring oil into the fire which it started to extinguish.

To persevere in this mad course can only lead to the most disastrous

results. The preparations for war lengthen the hours and shorten the purse of every worker on the globe. They absorb many of the best technical and organizing brains of mankind, so sorely needed for the rearrangement of the outworn machinery of distribution. And the physical training which the armies and the navies are supposed to give to the young men in reality does more harm than good. It is limited to that fit half of a country's manhood, which least stands in need of it. They are obliged to pass several years in the cities, where they contract habits which in many cases lower their vitality and make them reluctant to go back to the country homes whence they came. During these years they are debarred from marriage, whereas nothing prevents the less developed young males whom the services reject from becoming fathers! The weak, the decrepit and the malformed are not called to the drill walls. Neither do they go to sea.

But the armaments not only limit existing resources and retard the development of new treasures; they also contravene, hamper and trammel individual liberty in an ever-increasing degree. There can, indeed, be little doubt that the terrible recrudescence of State interference which is observable all over the world is just as much due to the immense growth of the preparations for war as to the iniquity resulting from a too great concentration of capital. The connection between these two phenomena is evidently much greater than is generally assumed. At the back of both of them looms the vicious doctrine of national self-sufficiency.

The preparations for war embrace today every possible phase of human activity. They necessitate an ever-increasing extension of the authority of the State, and the wielders of the Iron Fist and the Big Stick are really the natural forerunners of those curious friends of humanity who desire to turn every prospective mother into a slave of the State. Notwithstanding their revered titles, these two, Emperor and President, are the most dangerous of demagogues as they incontinently appeal to the timehonored sentiments and carefully nurtured feelings of the unthinking subject instead of to the free reason of the citizen.

If the pacifists really are in earnest they ought at once to abandon their national platforms and constitute themselves into an independent planetary association. Then, and only then is there some hope that they

could work without arousing the different war interests to renewed activity. As the world at present is constituted such an association can only bring its influence to bear upon mankind at large through the agency of one or two great Powers.

The choice of the pacifists is at the same time extremely limited. Amongst the great Powers there is to-day only one single nation where the war interests are comparatively insignificant. This Power is the United States of America. Its proud resolve to keep outside the quagmire of European conflicts has up till now been easily fulfilled. But there are ominous signs on the international horizon which make it certain that the splendid isolation of the Great Republic is soon bound to be a thing of the past. The ever-increasing interdependence of trade, shipping, and finance, of science and of social legislation, is daily making a planetary fabric of the old European net-work. The severing of but one or two of its intricate meshes affects no longer Europe alone. It is felt all over the globe. After the piercing of the Panama barrier this planetary interdependence of all the different parts of the globe will be still more acutely felt. The United States will come in closer contact not only with Australasia and Asia but also with those European Powers which strive to draw the lands bathed by the Pacific into the orbits of their political combinations. At the same time the northern neighbor of the United States with whom its intercourse is daily increasing stands, so to speak, at the parting of the ways. None can yet tell whether Canada will become a willing satellite of European aspirations and fears of the motherland, or whether she and her sister Dominions will be strong and clear-sighted enough to prevent Great Britain from forgetting that it has a greater rôle to play as the center of a globe-scattered empire, than as one of the historical powers of Europe.

Whether they desire it or not, the people of the United States will thus soon have to make up their minds as to what their policy in the new planetary epoch is going to be. They cannot, as in the nineteenth century, simply leave the Eastern Hemisphere alone. In the twentieth century the policy of the hemispheres is doomed. Our era demands a planetary policy, and both our era and our planet have great things to expect from the United States.

It would perhaps be rather difficult, though by no means impossible,

to prove that the general discontent of the present day is everywhere greater than it ever has been; but the assertion that the prevailing social discontent is for the first time in human history of a planetary import needs no demonstrations to be accepted as an incontrovertible fact. Neither will anybody try to deny the appalling truth that mankind grows more dissatisfied the more its power over natural resources is extended. This in itself is a warning that the civilization of which we so wantonly boast is in great danger.

To an open and unprejudiced mind it is not astonishing that such should be the case. It is a long time since the fatal separation of politics and ethics began. The former have always, as Bismarck said, belonged to the science of possibilities; the latter have so far never been adjusted to the possibilities of science. And though science to-day is more universal than ever, the absence of ethics in politics was never more conspicuous than to-day. This, of course, applies particularly to international politics, while the inherent goodness of man is still from time to time able to assert its humanizing influence in the affairs of the commonwealth.

The tremendous counteraction between internal and external politics is nowhere understood. If the voices which cry out when the ethics of the community are trampled under foot by local politicians are few and feeble, those who heed the actions of national leaders are as rare as they are mute. Dishonesty and unreliability which would disgrace private individuals are tolerated in political life. They are almost looked upon as public virtues in international dealings. Any one who knows and remembers the official and the secret history of the international politics of the last ten years would, as a private individual, turn his back on and refuse his hand to most of the heads of state and the leading ministers of Europe. The exalted positions which they occupy naturally bring their craft and their insincerity to bear upon the nations at large. And the evil influence is perhaps more pernicious in a self-governing nation where every citizen, in a measure, is responsible, than in an autocracy where he has nothing to say. Thus it is difficult to see from what quarter redress could come.

The United States has so far a rather clean or, at any rate, the cleanest record in this respect. But her morality in international behavior is

probably specially due to the fact that the Government at Washington has until lately had very few international dealings on its hands. Provided the honorable traditions of such Secretaries of State, as, for example, John Hay, are kept up, the increasing contact with the outer world, which is unavoidable and in fact already apparent, cannot fail to have a most beneficial influence on the internal affairs of the American Commonwealth.

Few indeed will dispute that nowhere and never was a high ethical purpose more needed. Through the divorce of ethics and politics the true interests of the majority have long been sacrificed to the momentary benefit of some thousands of unscrupulous individuals. The reaction which at last has set in is equally dangerous to self-government and individual liberty. The people cannot always hope to have a Woodrow Wilson at the White House. It would be but natural that the trend of reaction would follow the lines which it has taken on the other side of the Atlantic. But the immense growth of Stateism which nowhere has been so patent as in Great Britain, notwithstanding its name of the home of liberty, is in itself contrary to the principles of the American Constitution. In reality there is very little difference between the tyranny of a comparatively small number of private individuals and the yoke imposed by a host of so-called servants of the State. Through both agencies the free citizen is turned into a fettered subject. It may be that his position is less enviable under an all-powerful State whose manifold machinations are often hidden under misnomers. Every one imagines himself to have something to say in controlling the public servants. The greater their number, the more difficult it becomes to exercise this control. The votes of the servants of the State are ever at the bidding of those who voice the tyranny of habit. And the untold ramifications of State authority do not allow the down trodden to focus their revolt against a personality.

If liberty is not to become merely a dim constitutional phrase, it behooves the American people to take instantaneous action. The urgency and the gigantic complexity of the task demands, however, a complete unity of purpose between every kind of internal and external policy. There is not the slightest hope for success unless the polity is moved by one of those ethical revivals which lays the foundation for a

new epoch in human history. Most of us admire and envy the men and women of the past who were privileged to live through similar renaissances. To-day the chance is with the people of the United States! And the privilege is unique and greater than it has ever been. They can act, not only for a town, a country, or a continent. What they do will affect the whole planet.

The glorious work that is before the people of the United States demands the adherence to but one single principle, the principle of personal responsibility. But it is a responsibility which is no longer restricted to the family, the tribe, the nation, or the race. Each personality has at last become responsible to humanity as a whole. For the first time in the wonderful romance of our evolution distance has been eliminated. In one sense we have reached a final stage in our development. For the first time we know the ultimate sphere of our activities. All parts of the earth are explored and put into communication with each other. There are no longer unclaimed territories to conquer. Every bit of land belongs to some organized community which forms a more or less influential part of the international Aeropagus.

Consequently the action of each separate organization is bound to influence the whole of mankind as never before. Therein lies the greatness and beauty of national efforts of to-day, therein the excuse for our pleading for energetic participation in international affairs by the United States. If they are really concerned with the liberty of their citizens, they must to-day work for the liberty of mankind. In this respect inaction is just as full of consequences as action. In our planetary epoch, everything which they fail to do for the benefit of mankind will ultimately be to the detriment of their own citizens.

But however influential the voice of the United States may be in international affairs, it is not powerful enough alone to lead mankind out of the morass of the confining conceptions of nationhood. Fortunately, however, its citizens form a part of a greater whole, the Anglo-Saxon world. Whatever may have been their failings in the past, all Anglo-Saxon peoples to-day stand out and in unison as the upholders of the fundamental doctrine of self-government, which is the only true foundation for peaceful intercourse between the different nations of the earth. The depth to which this principle has taken hold of them is

borne out by the fact that neither the United States nor the British Empire nor the British Dominions could to-day be found willing to assume the government of new conquests. On the contrary, both the United States and the British Empire are unceasingly endeavoring to educate toward self-government the less developed races whom the relentless onward march of civilization has happened to place under their temporary control. That is the avowed colonial policy of both the United States and the British Empire, and of them alone among the colonizing nations of the earth.

The unique position of the Anglo-Saxon peoples is apparent in another and equally important aspect. They form through the ethics, which are the keystone of their theories of government, the only possible tribunal before which to-day any disturber of the international peace, that is to say any transgressor of the principle of self-government, can in justice be arraigned. They also, and they alone, possess the means of letting any number of offenders feel the force of the Law of Nations. Though they cannot, even if they so desired, prevent all wars, they are to-day in a position to hinder any disturbance of peace on the two great oceans which form the highways of international commerce. It is a position of great responsibility, but also full of marvelous possibilities. If recognized and duly accepted it is a position which ultimately will lead not only to naval, but to military disarmament. Thus mankind will at last be freed from those huge forces on sea and land which, with all the untold interests centering round them, far from preparing for peace, still nurture and foster the primitive war spirit of civilization's infancy.

But the opportunity which is now open to the Anglo-Saxon peoples may be of very short duration. Who can tell what strides aviation may make in the next twenty years? Perhaps flying-machines will eventually make it impossible for the Anglo-Saxon peoples to control the high seas. Then the unique chance for a graphical and unobjectionable demonstration of the futility of interfering with the peace of the oceans which the present offers will forever be gone. The ruinous waste of the wealth created by the labor of the humble will be transferred from the water and the land to the air. The fraudulent fraternity of the warlike professions and industries will be continued by the mutual bestowal of the dignity of High Flyer among the sovereigns of Europe! The wings of

the eagles will batter the wings of the doves, while our miserable descendants will curse the memory of fathers who failed to make use of the hour which once gone never recurs again.

By limiting their interference with war to the keeping of the peace of the Atlantic and the Pacific, the Anglo-Saxon peoples insure the success which is the unfailing due of a practical policy. They, hereby, in no sense whatever transgress the principles of self-government. The high seas belong to nobody. Peaceful intercourse on their waters is a necessity for the steady development of those relations which put the so wonderfully diversified resources of our beautiful globe within the grasp of each one of us. When the Anglo-Saxon world combines to protect the fastnesses and the shores of the two great oceans, it works, therefore, not only for that third part of mankind, which in one way or another owes it allegiance, but for the whole of humanity.

Herein lies the moral strength of the proposition. To make it equally unassailable from a naval point of view, the simplicity of its conception must be followed by a corresponding simplicity in the execution of the policy. The simpler the lines on which the policy of keeping the peace of the great seas is carried out, the more efficacious it will be. The lighter the burdens it throws on the Anglo-Saxon communities, the more readily its aims and necessities will be understood by those who have to bear those burdens. Fortunately the geographical position of the two oceans is such that a clear division of the naval responsibilities of each group, which together form the Anglo-Saxon world, is possible. Thus the unity of action, the unity of command, which is so essential to true economy in the employment of naval forces, can easily be secured. Just as the underlying idea for the co-operation between the United States and the British peoples, on account of its simplicity and of its stability, requires no central authority, nor even a formal treaty of alliance to make it clear and acceptable to all concerned—the carrying out of its naval consequences needs no formal consecration. And last but not least, the co-operation between the United States and the British peoples entails for each partner a considerable lightening of the burden of armaments.

The common work demands, of course, that each partner should absolutely trust the other. *If the pacifists, and particularly those who are*

British or American citizens, have any misgivings concerning the possibility of the enduring establishment of absolute confidence within the Anglo-Saxon combine, they might as well openly acknowledge that the whole peace movement is a farce. If common ideals, common traditions, common interests and common language cannot bridge national distrust, an agreement between all the nations of the earth for the abolition of war or the curtailment of armaments is clearly an impossible absurdity and the pacifists ought at once to cease a propaganda which is as wasteful as it has been proven to work against its own ends.

But in case the Anglo-Saxon peoples are able to trust each other, the division of labor between the partners of the combine is extremely simple. After the completion of the Panama Canal it will be easy for the United States to concentrate her whole fleet in the Pacific, even though the bulk of it must continue to be constructed in the already existing yards of the Atlantic. Without any increase in her naval armaments she will then be able to guarantee the peace of the Pacific, which forms the natural field for the exertion of the civilizing power of her enterprising industry. More than any other nation, the United States has an interest in keeping the open door in China. The American fleet can, single-handed, prevent any oversea attack on the Chinese Republic. It may by so doing perform immense services to China herself. Safe from aggression over the water, the government of Peking will be enabled to concentrate its military expenditure on its land forces and thus be in a better position to withstand possible attacks from powerful neighbors than if it also had to squander money on naval defenses.

With the whole American fleet in the Pacific, the Canadian west, Australia and New Zealand, and all the possessions of the British Empire in those waters would be absolutely secure from oversea attack, as any such aggression could only come from nations whose expansion would be equally fatal to the United States themselves. Consequently neither the British Empire nor the British Dominions need to expend any money in providing against attacks coming over the waters of the Pacific. The naval efforts of the British Empire in the Pacific could, in fact, be limited to the policing of the Persian Gulf and other purely local necessities.

While the stars and stripes would thus secure the peace of the Pacific,

the white ensign would render the same service in the Atlantic. The east coast of the whole American continent would be made safe by the only European Power which has explicitly recognized the Monroe Doctrine, and it would be perfectly possible for the United States to economize on her coasts defenses in the Atlantic. The condition is, of course, that the British fleet on its waters should be kept up to a strength that precludes any possible danger of attack across the Atlantic.

The naval burden which, through such a division of labor, would fall on the British Empire is much heavier than that assumed by the United States. Furthermore, it must for many different reasons, which cannot be detailed here, be borne primarily by the United Kingdom. Its close proximity to the armed continent of Europe makes it even imperative for Great Britain to provide for a not inconsiderable home defense army in order to be able to repel a possible invader who, however great the naval armament may be, under specially unfavorable meteorological conditions, might manage to escape the British fleet. In view of these considerations, justice and equity make it seem appropriate that any contribution which the British Dominions may think it their duty to offer to the common work of the Anglo-Saxon peoples, be it in money or in ships, should be applied toward lightening the heavy burden of the British Empire.

In the opinion of the writer, much confusion of thought would be avoided if the appellation "British Empire" was reserved to that portion of the British realm over which the Imperial Parliament at Westminster has any real authority. It comprises the United Kingdom of Great Britain and Ireland, with all the Crown colonies, India, Egypt, and all the other dependencies and protectorates. Canada, Newfoundland, Australia, New Zealand, and South Africa are *de facto* outside the proper sphere of any imperial authority, and must for practical reasons continue to be so, unless unsolvable questions of race and immigration shall unavoidably shatter the whole imperial fabric. But notwithstanding the lack of any central machinery for the co-ordination of the self-governing peoples who cluster round the symbol of the British crown, naval co-operation between the five Dominions and the United Kingdom appears more practical than, let us say, between Australia and the United States. A combination of the naval efforts of the British

peoples seems, so to speak, to be in the natural order of things. Their display in the Atlantic under one single supreme command has, besides, a very high ethical purpose to fulfill. There can be no doubt that the United Kingdom even to-day shows a much greater proportion of jingoes than either the United States or the British Dominions. It is of the highest importance for the success of the great pacifying task of the Anglo-Saxon combination, with which these lines are concerned, that this ugly blot on the character of the beloved motherland of self-government should be eradicated. It is a mission which can best be accomplished by those daughter-nations whose growth to full independence is of so recent date that the mother has not yet lost the habit of listening to their voices. Surely the old English spirit, which has created the wonderful domains of the Anglo-Saxon world by fostering the natural tendency to self-reliance and self-help inherent in every real man, is not yet dead among the inhabitants of those small islands in the North Sea which form the center of the greatest Empire that ever was. If such is the case, the mother will be proud of her daughters when they, as grown-up sister-nations, tell her that their co-operation can only be had at the price of making the family policy worth while for all its members.

Now none of the Dominions have the slightest interest in the European entanglements of the United Kingdom. The overwhelming majority of the citizens of the Dominions are strongly and rightly opposed to lending their support to any policy which possibly might involve the employment of their direct or indirect contributions to a British navy for purposes quite outside their concern. If, therefore, the statesmen of Great Britain are sincere in their so oftenly expressed desires to curtail the heavy naval and military expenditures of the United Kingdom, the first thing they ought to do is to revert to that policy of splendid isolation from European political squabbles which in the past has so well served British interests.

As soon as the whole might of the British navy is exclusively reserved for keeping the peace of the Atlantic, none of the Dominions worthy of the name of Anglo-Saxon, which stands for fairness and justice between man and man, will stand aloof. Made secure in the Pacific by the American fleet, Australia and New Zealand can cease to squander millions on the maintenance of citizen armies, as unnecessary as they would be

inadequate if the American fleet did not control the Pacific. The navies of Australia and New Zealand would find their proper sphere in the Persian Gulf and for showing the British flag wherever the Australasian situation should require it. Their naval harbors would always be open to the American fleet. Canada, which has to thank the United States for the safety of her Pacific coast, would be fair both to its southern neighbor and to the motherland by assuming her part of the burden of the Atlantic. If she devoted the millions she now wastes on a militia as useless from a military point of view as it is superfluous from any political consideration to the upkeep of the British navy she would materially assist the United Kingdom and openly proclaim to all the world how firmly her interests are bound with those of the United States.

The idea that the Dominions should keep military forces which could be employed in India is one of those confusions of the British mind which sooner or later would wreck the British Empire. The Dominions can have no moral right to shut out Indians from their frontiers unless they keep outside the British Empire and leave the United Kingdom well alone in its complex task of looking after its many millions of different races.

The natural complement of the Anglo-Saxon policy of limiting any active interference to the keeping of the peace on the two great oceans is a British withdrawal from the Mediterranean. In reality it is already an accomplished fact. The few British warships which ply its unruly waters represent no serious strategic factor. An increase of their number to anything corresponding to the rival fleets of its riverain powers would mean so serious a financial responsibility for the people of Great Britain that it is not likely to take place in spite of all the talk of that section of the British public which is unable to see that the European situation has changed since Nelson's time. Yet an explicit declaration of withdrawal from the Mediterranean is necessary. The presence of any number of British warships there, in excess of the local requirements of the British possessions, is incompatible with the avowed intention of the British peoples not to interfere with European politics.

The Mediterranean is of no particular value to the Dominions, and even to the British Empire it is only of secondary importance. If the British fleet is unable to guarantee the safety of its blue waves, the route

round the Cape of Good Hope has to be sufficient for imperial purposes. But as the co-operation between the British peoples and the United States would guarantee both the Atlantic and Pacific coasts of the French possessions from oversea attack, the chances are that the shorter route to India always would be open. France would be able to concentrate her available naval resources in the Mediterranean, where she can count upon the co-operation of both Spain and Greece. The former has identical interests in always keeping open the communications with North Africa. The latter could never throw in her interests with both of the Mediterranean Powers of the Triple Alliance. To further facilitate France's task it would be in the true interest of the British Empire to accompany her withdrawal from the Mediterranean by removing its objection to the opening of the Bosphorus and the Dardanelles to the Russian fleet. As long as militarism holds its sway over Europe, France and Russia must march together. France has now reached the climax of her expansion. There is nothing left which she can henceforth hope to lay her hands upon. Syria, upon which French chauvinists sometimes cast longing eyes, is perfectly capable and willing to take care of herself in case the Turkish Empire should fall asunder. It is therefore difficult to conceive of a repetition of the old French antagonism toward England. On the other hand, there would be no wheat-ships from Odessa if Russia became hostile. As long as France and Russia are allied they are bound to act in conjunction with regard to the bulk of those British food-supplies which pass the Straits of Gibraltar. In this respect the possession of Gibraltar, Malta, and Egypt is a valuable British contribution toward the safeguarding of those Mediterranean communications which really matter for the United Kingdom. Apart from adequate localized defenses these Mediterranean possessions of the British Empire are mainly secured by the inevitable interplay of rival European interests.

As for the pretended danger to India in case the Russian Black Sea fleet were able to enter the Mediterranean, the foregoing considerations have already given this side of the question its true importance. But as a general proposition, the present Viceroy of India, who possesses special qualifications for his judgment, having been both British Ambassador in St. Petersburg and head of the permanent service in Downing Street, was undoubtedly right when he publicly stated his conviction that a

Russian intention to attack India has never really existed. At any rate, there is no fear of such an aggression to-day. A Russian attack on India will always be impossible unless aided by the Indian peoples themselves. They are already to-day much further advanced toward self-government than the great mass of the Russian people. There is no likelihood whatever that they would prefer to exchange the gradually relaxing rule of the British Raj for the tyranny of the Czar.

In order to win the full and unstinted support of the Dominions, Great Britain ought also to release herself from those treaties which imply armed interference on the European continent. Such a step will, more than anything else, convince the outside world of the absolute rectitude and unselfishness of the Anglo-Saxon co-operation. It will give the distrusting peoples of Europe a tangible proof of the sincerity of the British intentions. The organization of the British army can be adapted to colonial purposes exclusively. Quite apart from these considerations, it is difficult to conceive how any serious political or military thinker could in our age have contemplated the employment of the expeditionary force on the battlefields of Belgium or France. The telegraph would send the news of its disembarkation on the European continent to every corner of the British Empire and so flame the spirit of unrest wherever it may be smoldering.

As a matter of fact, the openly avowed desires of the powerful military circles in Great Britain to interfere on the Continent are at the back of the latest increase of Europe's armaments. It may not be surprising that these desires should have found a warm welcome among the rank and file of the Tories who look to conscription as the best means to "discipline" the discontented working-men. Nor is it astonishing that their unscrupulous leaders saw a legitimate party weapon in the German scare. The disquieting feature of the situation is that the military caste has also succeeded in making the Liberals believe that England needs France more than France needs England. During the Moroccan crisis of 1911 it was the leading Liberals who pronounced those ridiculously exaggerated and grossly unfair speeches which are the main cause of the revival of French chauvinism and German popular hatred of England. Thus the latter really reaps what she has sown.

On the whole the German people may well be excused. They at

least have enough sense to understand that the sending of a gunboat with a crew of a hundred men to Agadir could not possibly aim at anything else than to direct French public opinion on the necessity of fair play in Morocco, already endangered by the contradictory tactics of the three foreign ministers who succeeded one another in Paris in the space of less than four months: To the Germans at large the British outburst was incomprehensible. Yet the Kaiser ought to bear the full share of his responsibility. For years the wearer of the shining armor has been studiously nursing the warlike temper of a people which for generations has passed through the mill of universal military service.

The objection that a refusal to defend the neutrality of Belgium would ultimately involve serious dangers to Great Britain cannot be taken seriously. Germany could not afford to conquer and keep either Belgium or Holland. The modern world knows, or at least ought to know, that nationalities can no longer be absorbed and the German Government has already enough troubles of this kind on its hands. It has had large experience of what nationalist parties mean in its Danes, its Guelphs, its Alsatians, and its Poles. It is unthinkable that it should wish to weaken the dwindling monarchical majority by making it possible for a new Belgian or Dutch party to swell the ranks of its opponents.

Nay, taken all round, considered from every possible point of view, the explicit and irrevocable withdrawal of Great Britain from European politics would be of incalculable service to the British Empire, to the Dominions, to the United States, to mankind as a whole. It is the primary condition for a successful combine of the Anglo-Saxon peoples on which the satisfactory solution of the problem of peace and disarmament hangs. Great Britain need feel no false shame in taking this essential step. It is by no means a confession of weakness! But to entirely counteract any possible misinterpretation of the courageous initiative, the strongest naval Power should accompany its voluntary withdrawal from the European card-table by a gift of singular magnanimity. Great Britain should withdraw its opposition to the expressed desire not only of the United States, but of Germany, Austria-Hungary, and seventeen other countries, that private property should be immune from capture at sea as it already is on land. It is, of course, extremely doubtful whether the general acceptance of this principle

would in itself make for a decrease in the armaments of the world. The naval profession, the royal and imperial admirals, and the captains of industry who live on the money sunk in warships would at once bolster up the supposed and enticing needs of coast defense both at home and in the colonies. Yet at least the excuse for the barbarous conversion of merchantmen to cruisers on the high seas would be gone. And what is more, the moral position of Great Britain would be immeasurably enhanced if she made it perfectly evident that she had nothing up her sleeve.

Standing quite outside the orbits of the two groups in which the armed camp of Europe is divided, Great Britain's influence in the unharmonious concert would be far greater than when she endeavors to play the trombone herself. When it is no longer directly concerned with the balance of power, Downing Street can always raise its voice in favor of moderation and count upon that respectful hearing from both parties which is the reward of any honest broker in a disinterested mediation.

The opportunity for a withdrawal from any direct participation in the quarrels of the dynasties of Europe is at present particularly favorable. The recent increase in the Belgian defenses together with the outcome of the crisis in the Balkans, where Greece and Bulgaria balance each other, while Roumania and Servia may add their forces to those of the Dual Alliance in preparing for the fulfilment of legitimate national aspirations, and a sober Constantinople might be expected to concentrate its energies upon consolidating Asiatic Turkey, enable France and Russia to look with equanimity on any further increase of the military forces of the Triple Alliance. There is now a balance of power between the latter and the Dual Alliance unaided by Great Britain. Thus her withdrawal, not from her friendships, but from her European engagements, admitted or not openly avowed, though generally understood, becomes almost imperative. It would tranquillize one side without endangering the other.

Among all the severe criticism which has been heaped on the present policy of Great Britain, it should not be forgotten that the United Kingdom in one respect occupies a unique position which makes her singularly fitted to play a leading part in a planetary movement. Alone of all the great nations of the earth the United Kingdom is an adherent

of free trade. Products of all countries can pass her own borders and the borders of her vast empire and compete on equal terms with the results of the labors of her own citizens. It is a truly magnificent position for a preacher of universal peace and good-will, a logical outcome of that principle of self-government of which the ultimate aim is the greatest human liberty imaginable; the possibility to move unhindered all over the globe and to enjoy its infinite resources as far as the limits of time permit.

In order to emphasize the sincerity and unselfishness of their safeguarding of the highways of international commerce, both Great Britain and the United States should once for all make it clear that they would henceforth abstain from seeking any concessions for their private citizens. The diplomatic, military or naval pressure which a government is able to exert abroad is due to the sacrifices of all taxpayers, to the exertions of the whole nation. There is no valid reason why it should be exercised on behalf of any private interests, whether they are those of an individual merchant or financier or the big armament firms, which in more sense than one masquerade as a national asset. Neither should missionaries be supported. They have no more right to concern themselves in the affairs of other nations than those unscrupulous financiers who furnish funds to foreign countries to enable them to provide the armaments necessary for a devastating war, after which the money-lender can renew his loans at a higher interest.

Yet whatever may be the relative position that each member of the Anglo-Saxon community occupies, every one of them has a splendid rôle to play in the glorious task which lies before them. Though it is a common work for the British peoples and the United States, it needs no higher authority than the full understanding of what self-government really implies. None of them need to exact anything from another that each would not be willing to grant. And one and all they are perfectly willing to let the peoples outside the Anglo-Saxon combine do as they please, provided nobody disturbs the peace on the great highways of international intercourse. Possessing no armies that can possibly compete with those of the great military powers, having abandoned the idea of interfering with private commerce, they have every right to be believed when they assert that their naval preparations only aim to

prevent war by making them powerful enough to destroy every fleet which leaves its own shores with aggressive purposes.

The United States, the British Empire, and the British Dominions need only show a little patience and consistency soon to see the inevitable result of a single-minded purpose. Before long peace will reign supreme on land as well as on sea, not because it is enforced, but because the strides which the Anglo-Saxon world will make under its shelter will be so great as to compel all other nations voluntarily to abandon their ruinous preparations for war.

The strategical distribution of the British and the American fleet will in itself be a most valuable geographical demonstration of the unshakable purpose of the Anglo-Saxon co-operation. From the moment the German people realizes that the British fleet under no circumstances whatever can be lured away into the Pacific or the Mediterranean, the preamble of the German Naval Bill will cease to have an appearance of reasonableness. It says that "Germany must have a fleet of such strength that even for the greatest naval Power, a war with her would involve such risks as to imperil its own supremacy." But if the superior British fleet is always concentrated in the Atlantic and seeks no supremacy elsewhere, the Germans would be no better off if they sacrificed their whole fleet in an effort to diminish the British than they were before. What was left of the British fleet would still control the Atlantic! Logically, therefore, the German people will soon be led to constrain the imperial government to curtail the heavy expenditure on a navy which evidently has no reasonable purpose to fulfil.

The Japanese would be in the same happy position. Knowing that nothing could entice the American fleet to leave the Pacific, they can well ask their Government for what purpose it burdens them with naval estimates when it is evident that Japan is both secure from oversea attack and unable to undertake any aggression across the water. From the actions of the United States in voluntarily abandoning the Boxer indemnity, in withdrawing its support to the Six Power Loan bankers, in announcing its intention gradually to give complete independence to the Philippines, the East has learned to trust to the purity of American desires and in the circumstance that the Great Republic practically shoulders the whole responsibility of her old British ally in the Pacific

Japan should see a special proof of the sincere disinterestedness of the Anglo-Saxon combine.

The Anglo-Saxon combine cannot fail to create a most profound impression on South America. The spectre of a European invasion would forever be gone. The fear of a misuse of the Monroe Doctrine would share the same fate, as it is evident that neither the United States nor Great Britain would consent to such a distribution of their fleets as has been here advocated, unless they both trusted each other to leave the republics of South America undisturbed. None of them would any longer resent a doctrine which in fact had become but a part of a greater whole: Pax Maritima. Neither can any legitimate objection be raised anywhere when it becomes evident that the coöperation of the British peoples and the United States does not aim at the protection of their own concession hunters, but on the contrary precludes any external pressure from being exercised in South America, where henceforth all investors would meet on equal terms. At the same time the British and American fleets are so immeasurably superior to the navies of the different South American States that it would be sheer folly for the republics to continue to squander money on ships which under no circumstances whatever would be permitted to fire a shot at each other.

Gradually the same sort of reasoning will be done everywhere. In Europe one may perhaps confidently expect that Norway and Holland with their intelligent populations will be the first to see the folly of wasting millions on doll navies when their coasts are amply protected by the British fleet. And the reduction of the British and American navies which will immediately follow any diminution of the naval forces of Germany and Japan will hasten both this reasoning and the process of naval disarmament. Eventually the naval interests will become silent.

That this return to common sense will have a powerful influence on popular opinion even concerning purely military armaments needs scarcely to be demonstrated. It will be heightened by the illuminating spectacle of seeing the great naval Powers of to-day diverting hundreds of millions of dollars from ships to education. And lest the Continental Powers of Europe should be tempted to increase their land forces by devoting the money saved on the navy to the army, let them become

aware of what will happen in Great Britain. The co-operation of the United States and the Dominions will enable the United Kingdom to save so many millions on her naval and military estimates that she can henceforth proceed to train her whole youth for the serious business of life. With every British boy and girl fully prepared to take part in the work of manhood or womanhood, it will be impossible for Continental Europe to compete in international commerce, unless it ceases to turn its cities into barracks. It will have to stop the mad proceeding of letting those of its workmen who least need physical improvement get stale through long years of military service. All nations must instead embrace a far more sensible fashion. Military disarmament will follow naval disarmament. The international competition will be transferred to the fruitful field of education.

In Great Britain vast sums will immediately be available. The withdrawal from the Mediterranean and the Pacific, where the British flag would be sufficiently represented by the navies of Australia and New Zealand, together with an adequate contribution from Canada and possibly South Africa, would make it possible to cut down the naval estimates of the United Kingdom by something like nine million pounds sterling. Yet a fleet of one hundred dreadnoughts and the necessary number of small crafts could be kept in the Atlantic. This could and ought to be done without any of those sensational parliamentary outbursts which of late have embittered international relations, because the simplicity and thoroughness of the Anglo-Saxon combine makes it possible to adhere to a simple standard of strength implying a fixed yearly shipbuilding program. Another nine million pounds would be at the disposal of the national exchequer if the antiquated and unnecessarily costly organization of the British army were overhauled. Thus some eighteen millions could be made free for educational purposes, and it may be asserted that no other European nation would under present financial conditions be able to find anything like this amount without cutting down its naval or military expenditure.

The savings of the United States would in the beginning not be quite so large. For some years they would still have to lay down two battleships a year. This program would give them a fleet which if concentrated in the Pacific would make it impossible for Japan ever to hope to

do something with her navy which is already grinding her taxpayers to starvation. Yet the economies to be effected on coastal defences and smaller craft, and which would immediately come into play, amount to many millions of dollars.

Thus the peaceful import of the Anglo-Saxon combine will at once be translatable into figures felt by their own citizens and evident to the whole world. The foreign policy of the British and American peoples will rest on the only secure foundation the ingenuity of man will ever discover. It will be to the advantage of the whole of humanity. Seeking no mean advantages from any nation, requiring no alliances with peoples who have not yet been able to attain self-government, neither the United States nor the British peoples need to pander to monarchical or oligarchical interests. True to their own principles both in internal and external policy, the statesmen of the Anglo-Saxon world can carry high the torch of liberty. Hidden by no protective screen, its vigorous light will soon illuminate the darkest corners of our globe. Self-government will everywhere come to its right. The idea that a self-governing community should wish to interfere with another will become as obsolete a conception as it is an illogical thought. The ethics which regulate the relations of the different communities will be the same as those which serve between man and man. The new freedom will be complete. The State will become the servant of the individual. It efforts will be exclusively directed toward preventing interference with liberty, not toward organizing its destruction.

A. SCHVAN.

THE RESPONSIBILITY OF THE FEDERAL GOVERNMENT FOR VIOLATIONS OF THE RIGHTS OF ALIENS

"The only government of this country, which other nations recognize or treat with, is the Government of the Union; and the only American flag known throughout the world is the flag of the United States." [1] The Government of the Union, as the only internationally recognized agent of the state, bears the responsibility for any violations of the rights which it owes to aliens, whether these rights are the result of treaty obligations or of international law.

Aside from particular obligations arising under treaties, a state is obliged to secure to aliens which it has admitted within its territory not merely the same extent of protection of the person and of vested property rights as the native ordinarily receives, but the extent of protection to which the native is legally entitled.[2] However, in the United States the central government, which bears the responsibility for the fulfillment of the international obligations of the state, has not the power under the Constitution to enforce by direct action on the individual respect for these obligations. Furthermore, the various branches of the Federal Government itself may disagree and block the necessary action.

The first important case of the inability of the Federal Government to carry out its obligations was that of McLeod in 1841.[3] McLeod was arrested by the police of New York and charged with the murder of those killed in the destruction of the *Caroline*. Although Great Britain took up the destruction of the *Caroline* as an act of state and demanded McLeod's release, the Federal Government was unable to free him because the case was pending in the State court. This situation was made

[1] Fong Yue Ting *v.* United States (1893), 149 U. S. 698; see p. 711. C. H. Butler, Treaty Making Power of the United States (1902), Vol. I, p. 141, note.

[2] Elihu Root, "The Basis of Protection to Citizens Residing Abroad," this JOURNAL, Vol. IV (1910), pp. 521–523.

[3] Moore, Digest, VI, 261. Butler, Treaty Making Power of the United States, Vol. I, p. 143.

thenceforth impossible by the extension by Congress of the Habeas Corpus Act to cover such cases.[4]

A similar case the following year was that of the Northeast Boundary. "Besides the serious difference in the point of view of the two nations concerning some of the questions involved, a special obstacle to agreement lay in the fact that there were really four parties to be consulted instead of two; in addition to Webster and Ashburton, commissioners from the interested states of Massachusetts and of Maine also took part. The legislature of Maine had passed a resolution refusing to regard the acknowledgment of her claim to any portion of the disputed territory as an equivalent for the surrender of the rest." [5] The Federal Government finally satisfied these two New England States with various considerations, including $150,000 each.

The affair at New Orleans in 1891, in which several Italians were lynched with the connivance of the police, is of more importance today as it is of likely occurrence at almost any time. The United States was unable to agree to the Italian demand for the punishment of the offenders.[6] The question of punishment has come up in other cases, the most notable being those of John H. Tunstall's murderer[7] and of the anti-Chinese rioters[8] at Rock Springs, Wyoming, Denver, Colorado, and elsewhere.

Twice within the past decade the United States has had disputes with Japan over the treatment of the Japanese in the State of California. In 1906 President Roosevelt and in the present year President Wilson have had to face the Empire of Japan on the one hand and the State of California on the other.

The United States has never denied its obligations in such matters.

[4] Revised Statutes, sec. 753; C. H. Butler, Treaty Making Power of the United States, I, p. 148, note.

[5] Garrison, "Westward Extension" (Am. Nat. Series, Vol. XVII), pp. 81–82.

[6] Blaine to Porter, 29 March, 1891, 1891 For. Rel. 675; Blaine to Marquis Imperiali, 1 April, 1891, 1891 For. Rel. 676.

[7] Evarts to Thornton, 7 March, 1881; Moore, Digest, VI, 663.

[8] Evarts to Chen Lan Pin, 30 Dec., 1880; 1881, For. Rel. 319; Moore, Digest, VI, 820–822; Charles H. Burr, "The Treaty Making Power of the United States and the Methods of its Enforcement as Affecting the Police Powers of the States," Proceedings of the Amer. Philosophical Society, Vol. LI, No. 206 (Aug.–Sept. 1912), p. 377.

Its attitude has been that the central government is responsible for the punishment of offenders, etc., but that this responsibility, in cases where the central authority cannot control prosecutions, may be satisfied by means of a money indemnity; in other words, the United States maintains the right, whenever it is impossible to give specific performance because of the political structure of the government, to pay damages for non-performance.

The United States is not alone among the nations a government without power to enforce internally its external obligations. "These questions are of interest not only to American publicists, but also to Englishmen, for they are questions which may in a different, but, perhaps, not less serious, form arise out of the anomalous position in which Britain now stands to her great self-governing colonies." [9] The case of the *Montijo* against Colombia in 1871 touched on this question of internal relations.[10] Secretary Fish in 1875 argued the responsibility of Brazil for the acts of the authorities of a province.[11] Mr. Finley, the umpire in the United States and Venezuelan Claims Commission under the convention of 5 December, 1885, was called upon to declare the responsibility of the Government of Venezuela for the acts of one of the "independent" States composing Venezuela.[12]

In the United States all cases in which an alien is a party may be reached by the Federal courts. The second section of Article 3 of the Constitution opens to aliens the Federal courts. In spite of the fact that the United States has taken in general the stand that so far as the external responsibilities of the state are concerned an alien domiciled here is not to be considered a foreign subject, [13] our courts have held that so far as concerns the right of an alien to sue in the Federal as well as in the State courts his status is not changed by domicil, or even by a formal declaration of intention.[14] For instance, in the recent (1893)

[9] James Bryce, "Legal and Constitutional Aspects of the Lynching at New Orleans," Littell's Living Age, Vol. 189:579.

[10] Moore, Arbitrations, pp. 1421–1446.

[11] Fish to Partridge, No. 141, 5 March, 1875; Moore, Digest, VI, 816.

[12] Moore, Arbitrations, 2971.

[13] For instance, 1898, For. Rel. 97–109; Moore, Digest, III, 757–795; 1885, For. Rel. 450–459; 1898, For. Rel. 529.

[14] Breedlove *v.* Nicolet, 7 Pet. 413–432. Tucker, The Const. of the U. S. (1899), II, 797; on verification, Tucker's references seem insufficient.

Circuit Court case of Minneapolis *v.* Reum,[15] 12 U. S. App. 446 (8th Circuit), it was held that "A foreigner, resident in the United States, who has declared his intention of becoming a citizen, but has never done more in compliance with the naturalization laws, although by the constitution and laws of Minnesota, where he resides, he has the right to vote and all the other privileges of citizenship, and has actually voted at a congressional election, is none the less an alien."

Further, the Federal Government can now control certain cases by habeas corpus. But there is no real control except in this negative way. The attendance of a representative of the Federal Government at the trial of an offender against the rights of aliens has no legal effect. And the influence of a president in limiting ill-advised legislation, powerful though that influence be, is not at all conclusive.

The possible methods of avoiding international complications of the kind indicated above are (1) the drafting of treaties as legislative acts, (2) the extension of jurisdiction by statute, and (3) constitutional amendment.

The decisions of our courts in regard to the extent of the subjects on which treaties may be made may in general be reduced to the statement that the President and Senate may include in a treaty any of the ordinary subjects of treaties. The purpose of the makers of the Constitution was to obtain on the necessary matters a uniform rule of action. This must have included all necessary matters, the necessity being determined, in the absence of special circumstances, by the ordinary presence or absence of such provisions in treaties. If the matters of which a treaty might treat are limited to matters under the jurisdiction of the Federal Government only, there are numerous matters which because the State Governments may not make treaties cannot be put into an international agreement. It seems illogical to think that the makers of our Constitution did not wish the government to have a free rein in case of unlooked-for occurrences. Again, words are to be interpreted in their ordinary meaning if that meaning makes good sense. The fact that the makers of the Constitution failed to insert any definition of a treaty or to put down specific limitations is an indication that the word *treaty* was under-

[15] Summary from Lewis' Digest.

stood in its usual meaning and as involving the ordinary matters contained in treaties.

In spite of the fact that under the Constitution a treaty is the law of the land in the same way as an act of Congress, the courts are not able to apply to any particular case the general provisions of the ordinary treaty, obviously in need of supplementary legislation concerning penalties, procedure, etc. "A treaty which merely stipulates for future legislation, addresses itself to the political and not to the judicial department; and the latter must await action by the former." [16] Of course, this does not apply where there is no need of specific provisions; for instance, a treaty provision that aliens may hold land on the same terms as natives is applicable by the courts, since the provision may be brought up as the ground for a suit or as an exception against one. But, ordinarily, "if rights of action are to be given, those rights should be precisely set forth; if violations of treaty provisions by mobs or otherwise is not to be encouraged, provisions for the punishment of violators should be added and stated with the meticulous phraseology of a criminal statute." [17]

James Bryce looks upon the substitution of specific provisions in treaties as a possible solution for the United States to adopt.[18] However, this would not be a complete solution of the problem to be met. The question is as much one of the protection of aliens in their rights under international law as it is one of the protection of the treaty rights of aliens. And this proposed solution leaves unprotected, in the absence of treaty provisions, the rights of aliens derived from international law. As no system of treaties, no matter how widely extended to the nations of the earth and no matter how well they may for the moment codify international law, can exactly specify all the rights of aliens under our constantly changing international law, the legislation possible by Congress must be looked to as part of the remedy of the present conditions.

[16] Foster *v.* Neilson, 2 Pet. 253; this quotation is the summary from Kinney's Digest, II, 1890.

[17] Charles H. Burr, quoted above, p. 395.

[18] James Bryce, "Legal and Constitutional Aspects of the Lynching at New Orleans," Littell's Living Age, Vol. 189, p. 584.

There is already a law regarding cases affecting public ministers.[19] There is one regarding the freeing by habeas corpus of those setting up a defence based on alienage, foreign domicil, and the fact that the act complained of was done under orders from a foreign sovereign.[20] The Constitution allows an alien to bring suit in or have his suit transferred to a Federal court. But there is no provision regarding the punishment of those who by violating treaties or international law may plunge this nation into war. The Constitution prevents a State from being sued "by citizens or subjects of any foreign state"; but this would not apparently prevent the Government of the United States, after having been forced to pay a foreign claim, from suing the individual State for the recovery of the money.

"A bill to provide for the punishment of violations of treaty rights of aliens was introduced in the Senate March 1, 1892, and reported favorably March 30. * * * The bill so introduced and reported provided that any act committed in any State or Territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country and constituting a crime under the laws of the State or Territory shall constitute a like crime against the United States and be cognizable in the Federal courts." [21] The bill was not enacted nor was a similar one in 1902. Harrison, McKinley, and Roosevelt recommended such a law.

The cases decided by our courts seem to indicate that Congress may punish violations not only of treaty rights but of rights arising under international law as well. For instance, the case of United States *v.* Arjona [22] upholds, though not as part of the fundamental reasoning, the power of Congress to legislate to punish violators of international obligations, since Congress is expressly authorized "to define and punish * * * offenses against the law of nations." The decision in

[19] Revised Statutes, secs. 4062–4064; act of April 30, 1790, 1 Stat. 117, 118; Moore, Digest, IV, 623, 631, VI, 814–815.

[20] Revised Statutes, secs. 752, 753, 754; C. H. Butler, cited above, I, 148, note.

[21] Annual Message, 1899, For. Rel. xxiii; Moore, Digest, VI, 846.

[22] 120 U. S. 479; Samuel McClintock, "Aliens under the Federal Laws of the United States," Ill. Law Rev., 1909, p. 94, note.

the case of Baldwin *v.* Franks [23] is even stronger, but applies only to the protection of treaty rights. This case, while denying that Congress had taken such action, declared that it had the power to punish attacks on aliens protected by treaty.

Any such legislation, if it is to have effect, should include definite provisions for the use of Federal police within the boundaries of a State. In that case the Federal Government would not be obliged to delay its protection until invited by the State.

In case it should prove that these proposed acts are unconstitutional, certain constitutional amendments would solve the problem.

Switzerland, in many ways not so highly centralized as the United States, may give us example. In Switzerland, each Canton has the power of making treaties, which, however, in the case of objection by another Canton or the Federal Council, must be approved by the legislative body of the federation. Otherwise the power to make and enforce treaties is exclusively in the hands of the central government. The legislative body has the power to adopt measures for fulfilling federal obligations.[24] "The Federal Court, assisted by a jury to decide upon questions of fact, has criminal jurisdiction in * * * crimes and misdemeanors against the law of nations. * * *" [25] It shall further have jurisdiction in cases of "complaints of violation of the constitutional rights of citizens, and complaints of individuals for the violation of concordats or treaties. * * * In all the forementioned cases the Federal Court shall apply the laws passed by the Federal Assembly and those resolutions of the Assembly which have a general import. It shall in like manner conform to treaties which shall have been ratified by the Federal Assembly." [26]

These provisions of the Constitution of Switzerland provide for the enforcement by the central government of obligations arising from international law as well as of those arising from treaty provisions. This would be, if the unconstitutionality of the statutes before mentioned be

[23] 120 U. S. 678 (1886–1887).

[24] Constitution of Switzerland (translation by Prof. A. B. Hart, Old South Leaflets, Vol. I, No. 18), Art. 85.

[25] Same, Art. 112.

[26] Same, Art. 113.

admitted, a valuable amendment to the Constitution of the United States, with the addition of a specific recognition of the power of the Federal Government to guard by means of a Federal police against expected violations.

NELSON GAMMANS.

REPRESENTATION IN PUBLIC INTERNATIONAL ORGANS [1]

The recommendation included in the Final Act of the Second Hague Conference provides for a preparatory committee to elaborate a program and adds: "This committee should further be entrusted with the task of proposing a system of organization and procedure for the Conference itself." [2]

Presumably the next conference will take place in 1915 and therefore the time is ripe to consider matters which will become subjects of importance in the body of the conference. Within a comparatively few months the governments of the world will be actively engaged in studying the questions which should be brought before the conference in accordance with the above recommendation. Any suggestions on matters to be taken up by the conference should be elaborated by those who have ideas to offer before the official machinery looking toward the calling of the conference is actively in motion. It is with this purpose that the present study of the basis of representation in international organizations has been made.

[1] A partial bibliography on the subject follows:

"Notes on Sovereignty in a State," by Robert Lansing, 1 this JOURNAL, 105–128 and 297–320; "The International Congresses and Conferences of the Past Century as Forces Working toward the Solidarity of the World," by Simeon E. Baldwin, 1 JOURNAL, 565–578; "International Unions and Their Administration," by Paul S. Reinsch, 1 JOURNAL, 579–623; and the same author's work entitled "Public International Unions"; "Recommendation for a Third Peace Conference at The Hague," by James Brown Scott, 2 JOURNAL, 815–822; "International Administrative Law and National Sovereignty," by Paul S. Reinsch, 3 JOURNAL, 1–45, especially 25–26 and 26–33; "The Fourth International Conference of American Republics," Paul S. Reinsch, 4 JOURNAL, 777–793; "The Equality of States and the Hague Conferences," by Frederick Charles Hicks, 2 JOURNAL, 530–561; "Equality of Nations," paper by Frederick C. Hicks and discussion by John W. Foster, L. B. Evans, N. Dwight Harris, F. W. Aymar, Theodore P. Ion, E. C. Stowell, and Lyman Abbott, Proceedings of American Society of International Law, 1909, 238–257; Institutes of the Law of Nations, by James Lorimer, Chaps. XV and XVI; *Annuaire de la Vie internationale*, 1908–9, 1910–11.

[2] See 2 SUPPLEMENT this JOURNAL, 28; Scott's Texts of Hague Conferences, pp. 139–140.

Since the close of the Second Hague Conference international administration and its problems have come much to the fore. The *Office Central des Associations Internationales*,[3] having for its object the specific purpose of studying and promoting international organization, began its active existence in 1907. The Carnegie Endowment for International Peace [4] has been established and the World Peace Foundation has set to work; the whole pacifist movement is more and more emphasizing internationalism as a fact and a desideratum. These and many other significant developments—such as the beginning of codification by the American Society of International Law,[5] the formation of the Pan-American Commission of Jurists and of the *Comité juridique international de l'aviation* [6]—indicate that the time has arrived for more proficient international administrative machinery than is now provided by formal diplomatic relations between civilized countries. Such matters as the codification of international law and the drawing up of a model of a law to regulate aeronautics lose much of their force if adequate governmental machinery is not available.

Many of the most uncertain questions arising under international law have been solved or are on the way to solution by the Hague Conferences. Much more remains to be done, it is true, but it seems to the writer that it might be well to consider the organization of international administrative functions at the next conference, in addition to the questions of law which will be brought before it. And, in fact, representative organization was the very rock on which the Court of Arbitral Justice foundered; so that representation at least is a practical problem.

World-wide conditions in the last fifty years have to a remarkable extent brought the states of the four continents which are inhabited by sovereign nationalities to the necessity of meeting in diplomatic and private conferences and congresses to decide matters of importance for all. Nearly a hundred such gatherings—mostly of private associations—are held annually, and the number is constantly on the increase. Essen-

[3] See 4 JOURNAL, 1012; *Annuaire de la Vie internationale*, 1908–9, 1910–11, and *La Vie internationale*, 1912.

[4] See 5 JOURNAL, 210 and 448, and Yearbooks of the Endowment.

[5] See 4 Proceedings, 27 and 193; 5 *ibid.*, 19, 312, 320.

[6] See H. Doc. 1343, 62d Cong., 3rd Sess.; *La Revue juridique internationale de la Locomotion aérienne* and 4 JOURNAL, 696.

tial to the proper conduct of their business is the establishment of a recognized code of procedure which will serve as a skeleton into which their specific discussions may be fitted so that each state or delegate may get his rights to the floor, have his vote counted justly and secure the influence in the gathering to which he is entitled. For official conferences and organizations,—which are headed by the peace meetings at The Hague and the permanent machinery established there,—the matter is of prime importance, and practice regarding the basis of representation in their case comes into direct opposition to the long-honored shibboleth of international law that sovereign states are equal and entitled to a like voice whether their sway is as large as Britain's or as small as Luxemburg's.

Theoretically sovereign equality was absolute as between states when the system of international law under which we exist came into being, that is, after the Peace of Westphalia. But, like many another legal theory, it has never been actually realized, for complete isolation alone would permit the perfectly free operation of all sovereign functions. The fiction was therefore altered as to its phraseology, and instead of a claim to actual equality respecting sovereign functions only the right to sovereign equality was asserted, and remains to-day as the basis of international law. That theory is workable, and not until the world becomes a governmental unit—if that ever comes—can the theory itself be discarded. For as a theory it simply means that sovereign functions are the normal attribute of the state, and it puts the burden of proof against change affecting them; in no way does it prevent any of them—the functions of existence, independence, equality, jurisdiction, property and intercourse—from being constructively or actually diminished; but, to use a military term, the principles of sovereignty are always entrenched, and the effort to dislodge them always has the disadvantage of the attack with which to reckon. Even the most cursory glance at treaty literature will indicate to the technical mind that sovereign attributes are in some slight degree restricted by every agreement of a state to do anything. In practice, and even by servitudinous or protectorate treaties, absolute equality has been so diminished; but in general equality, especially in respect to voting power, has been the most jealously guarded of sovereign attributes. Perhaps the explana-

tion is that it has been less affected by practical considerations than other attributes, the attacks on it being mostly academic or reformatory in character. Yet the recurring Hague Conferences render the examination of juridic equality itself a practical question, and the acceptance of the Convention for the Establishment of an International Prize Court in 1907, involving inequality, undoubtedly showed a trend in diplomatic affairs. Though the Court of Arbitral Justice failed to reach the convention stage, record of its desirability was unanimously made in the Final Act and it is significant that the only scheme for selecting judges that received seriously sustained attention provided for disregard of strict juridic equality. The Prize Court Convention—already accepted by the signatures of 32 states—provides for as great a departure from the strict interpretation of the equality principle. The belief is widespread that attempts will be made at the Third Hague Conference on the part of the larger states to secure a voice approximating their actual stake in international affairs. It is therefore a pertinent inquiry to investigate objectively the character of representation already existing in diplomatic or semi-diplomatic organs.

When the co-operative work of the sovereign states in diplomatic and administrative matters was non-existent or very small, the unit rule of sovereignty was a very satisfactory solution of the problem of precedence. With the increase of international relations and the emergence of the definite ideas and plans of internationalism, however, the latent objections to the unit rule have come into prominence. This rule has heretofore been accepted by the mere fact of its existence and the lack of material with which to make a practical attack upon it; for it has long been irksome to the great enlightened Powers to find themselves thwarted in international matters by backward states. The successful states have usually become so large in area and so diversified in interests that the rule of one vote to each sovereignty is now rather a rule of inequality than of equality. Moreover, in the developments of recent years such large aggregations of territory as the British Empire have shown a tendency to break up into self-governing dominions; and by the technical rules of international law the sovereignty of these divisions of the empire is only perceptibly inchoate, even if it is optional. The Dominion of Canada, for instance, is probably quite as much entitled

to fall within the definition of a sovereign state—though it prefers its membership in the British Empire—as was Montenegro entitled to fall within that definition before the Balkan War, notwithstanding the numerous servitudes placed upon it by the Ottoman Empire from which it was separated and by Austria-Hungary to which it was adjacent. The emergence of these inchoate sovereignties constitutes a new fact which diplomacy must face.

In 1907 the representatives of the members of the British Empire met in London for their periodic Colonial Conference. As a result thereof the Dominion of Canada, the Commonwealth of Australia, and New Zealand secured an increase of their dignity and are known at present as self-governing dominions, the South African Union now figuring in the same class. In 1911 what was really another colonial conference convened under the name of the Imperial Conference, the change in title indicating in some degree the increase of dignity gained by the self-governing members of the empire. At this conference the following resolution was unanimously adopted:

> That this conference, after hearing the Secretary of State for Foreign Affairs, cordially welcomes the proposals of the Imperial Government, viz.:
>
> (a) That the Dominions shall be afforded an opportunity of consultation when framing the instructions to be given to British delegates at future meetings of the Hague Conference, and that conventions affecting the Dominions provisionally assented to at that Conference shall be circulated among the Dominion Governments for their consideration before any such Convention is signed (*sic*, ratified);
>
> (b) That a similar procedure where time and opportunity and the subject matter permit shall, as far as possible, be used when preparing instructions for the negotiation of other international agreements affecting the Dominions. [Imperial Conference, 1911. (Dominions, No. 7) Cd. 5745. Resolution at page 15; discussions at 89–90, 97–100, 113–116, 120, 125, 129–132.]

Even granting that the reference to dominion approval before signing a convention is a technical error and that such approval before ratification was the intention of the conference,—as seems to be the case,—the resolution and its acceptance by the British Government is of great significance. It probably will result that the British delegation to the Third Hague Conference will include representatives of the self-governing

dominions themselves, and it is not unlikely that recognition of them in that capacity will be sought. It is very possible that the British Government will be impelled to accept some convention under a reservation made in whole or in part on behalf of Canada, Australia, New Zealand or South Africa; such a reservation would naturally bring the whole question of sovereign unity and equality under review.

When that question arises in a practical manner it will have to be fought out to a finish or a compromise. If Great Britain were alone concerned, the matter would not have much practical bearing; but the other large Powers chafe under the relatively unequal influence wielded in international diplomatic conferences by the small states. Some of the small states with dependencies stand to gain by a change of practice, and if such possible combinations as a Balkan confederation or a Central American federation take place there will also be smaller states interested in the revision of a theory which would place them at a disadvantage. The empire kingdom of Austria-Hungary would doubtless welcome a double vote.

The writer is not unduly perturbed at these developments, but he does believe that, since the facts point to a coming attack on the sovereignty theory, it is important to have as complete knowledge as possible of the conditions involved before the case comes, as it were, to trial.

The present study deals with the fundamental question which must be adequately examined and on which a solution must be found before the world can have the positive assurance that the Peace Conferences are to continue as a permanent institution among the many forces that make for peace and justice in the relations between nation and nation. Effort has been made to show what definite tendencies are in existence looking toward a more equitable distribution of voting and vocal power than is found in the sovereignty theory. The objective study of the subject has therefore been founded on the actual basis of representation in official international conferences and organizations. Its results indicate the practice of the world in this respect, and perhaps its tendency. It does not deal with the opinions of authorities, however great their reputation, nor to any considerable extent with the conclusions of government officials. These sources were considered in an article by Frederick

Charles Hicks in this JOURNAL, Vol. II, pp. 530–561, where, at page 560, he concludes:

> * * * As with man, so with states, suffrage is not a natural or inherent right. It comes only after compliance with rules established for its regulation. A man's vote represents himself and his family. There are physical limits to the influence and power which he may represent. A state, on the other hand, may be of almost any size and power. Yet with the present method of voting (one state one vote), no state is properly represented.

Mr. Hicks wrote immediately after the Second Peace Conference had encountered great difficulty in discussing the propositions for the Court of Arbitral Justice and the International Court of Prize,—both involving unequal representation,—in a diplomatic conference where the voting ability of every state was equal to that of every other. It is of importance to know from thorough investigation whether those who stood for strict equality or those who wished to shade the influence of a state's voice in accordance with its relative value in the specific case were the more in consonance with the times. Was the adherence of the largest Powers to the latter principle an advanced position, jibing with the tendency of international law; or was the attitude of those other states, who won their point on the Court of Arbitral Justice through the rule of unanimity and who insisted on absolute equality, the more enlightened?

Statistics do not answer the question very definitely, although it would seem that the equality idea is being more and more crowded into the background. Conferences almost without exception cling to the principle of absolute equality of vote—I am speaking of diplomatic meetings—but it is admittedly unsatisfactory, and what may be called an indication of a modern solution of the problem is found in the proposition adopted by the International Radiotelegraphic Conference of Berlin in 1906, when it was agreed that colonies should be admitted to the future conferences with one vote for each colony, the limit of votes for each sovereign being six. Here is an effective and yet a feasible method of bestowing legitimate influence in a diplomatic conference upon a Power of the first class.

The accompanying summary of official practices [7] has been prepared

[7] The table subjoined deals only with official organizations. The writer has aimed to make a careful distinction between those organizations which owe their existence

to give a ready comprehension of what has been done regarding representation, and 45 different conference series or organizations have been considered. In many instances the question of classification has proved

to the initiative or the support of the nations themselves and those which are purely private in character, or mixed in membership. Government supported organizations are called official; those containing representatives of private societies and which are also given official standing are called mixed; and those which are entirely the result of private initiative are called private. Mixed organizations have generally been excluded unless their character was preponderantly official.

The following is a summary of the analysis made:

VOTING POWER

State Unit. Hague Conference, 1899 and 1907; Pan American Conference 1889–90, 1902, 1906 and 1910; Universal Postal Union, 1869, with colonies separate; International Radiotelegraphic Conferences, 1906 and 1912, with colonies up to five; Universal Telegraphic Conference, 1875 on, with colonies and proxy allowed; International Weights and Measures Conference, 1875 on, with colonies separate; Central American Conference, 1907; Red Cross Central Committee, 1864; Geneva Conference, 1906; International Conference on Literary and Artistic Property, 1884 and 1885; Kongo régime, 1885; International Geodetic Association, 1864 (rules 1897); International Association of Seismology, 1903, proxy allowed; International Exploration of the Sea, 1899, each state two delegates; International Sugar Union Convention, 1902; International Sugar Union Commission; International American Conference, 1826; International Conference on Expositions, 1912, with colonies separate. TOTAL, 18.

Representatives. Brazilian proposal for Court of Arbitral Justice, 1907; Central American Bureau, 1907; International Sanitary Convention, 1903; Cape Spartel Lighthouse Commission, 1866; International Sugar Union Commission, 1902, with reduction for non-exporters. TOTAL, 5.

Flexible Panel. Court of Arbitral Justice proposal (final majority vote), 1907; International Prize Court, 1907; Latin Monetary Union, 1885, based on population; International Geodetic Association, 1864 (rules 1897), based on population; International Association of Seismology, 1903, based on population. TOTAL, 5.

Majority of Delegates. Red Cross Conference (rules of 1892, for meetings of Red Cross workers, official and private). TOTAL, 1.

EXPENSE BASIS

Voluntary Expense Units. Permanent Court of Arbitration, 1899 and 1907; Chinese proposal for Court of Arbitral Justice, 1907; Permanent Bureau of Hague Court, 1899; Universal Postal Union, 1869, with colonies separate; International Telegraphic Bureau, 1868, with colonies separate; International Institute of Agriculture, 1905, with colonies separate; International Sanitary Office, 1907; International Literary and Artistic Property Bureau, 1884–5; International Industrial Property Bureau, 1887. TOTAL, 10.

Equality of Expenses. Brazilian proposal for Court of Arbitral Justice, 1907; Cen-

a hard nut to crack, one danger being the temptation to assimilate systems closely allied, without further attempt at distinction. It is hoped that the analysis given in the summary will prove generally acceptable, but the arbitrary titles given to the systems must be explained at the outset to make further study of the subject either intelligible or profitable.

It has been found necessary to divide the practice of official conferences or organizations under seven heads, which include two entirely separate points of view, voting power and engagements in regard to expenses. It was impossible to determine what principles of representation were followed from the material at hand—invariably the statutes or constituent conventions—without adopting this dual scheme, and the work was still more hampered by the fact that in the majority of conference reports examined no indication of the method of procedure was given. For instance, the official report of the First Peace Conference, which I have read from cover to cover with the exception of about 100 pages, gives no hint of the basis of representation otherwise than by the inferences that may be drawn from the votes taken and the comment thereon. The first volume of the *Actes et Documents* of the Second Conference, however, gives the rules adopted.[8]

tral American Bureau, 1907; Riverain Commission of the Rhine, 1814, 1831, 1868; Zanzibar Bureau for Repression of Slave Trade, 1895. TOTAL, 4.

Expense Units Based on Size. Bureau of Pan American Union, 1902, 1906 and 1910, population; International Bureau of Weights and Measures, 1875, population times coefficients varying for obligatory and optional members; Bureau for Publication of Customs Tariffs, 1890, commerce; International Sanitary Supervisory Board, 1907, based on voluntary quota paid for maintaining Sanitary Office; Central Office of International Transports, 1892, kilometers of railroad; Pan American Bureau of Literary and Artistic Property, 1906, population; Toll Régime on River Scheldt, capitalization on extent of use. TOTAL, 7.

[8] The following is the discussion upon this rule of the conference (*Actes et Documents*, I, 56; *cf.* Foreign Relations, 1907, 1147):

Art. 8. When a vote is taken each delegation shall have only one vote.

The vote shall be taken by roll call, in the alphabetical order of the Powers represented.

The delegation of one Power may have itself represented by the delegation of another Power.

Sir Edward Fry said that the British delegation was opposed to the third paragraph of Art. 8. He thought that the conference is a deliberative assembly and that consequently a delegation which has not taken part in the deliberations ought not to take part in the voting.

In fact, it is only within the last ten years that there has come a definite recognition of the necessity of solving the problem of parliamentary procedure for international organizations by means of specific rules. Earlier conferences and organizations almost invariably overlook the desirability of reaching upon questions of organization such conclusions as shall at the same time meet their needs and shall be different in detail from the customary rules governing parliamentary bodies. This development may be illustrated by the practice of the International American Conferences. The first conference of 1889–1890 dealt with the matter only along the lines laid down by the recognized rules of international law relative to the equality of states and the accepted schemes of parliamentary procedure. The second conference of 1902 found representation and voting more troublesome but, I believe, operated under no individual set of rules. The third conference had drawn for it in advance a set of regulations in 28 articles under which practically no question could arise without its being answerable under the letter of the rules.[9] The fourth conference of 1910 devoted considerable time to fixing questions of mere procedure.[10] Other conferences show about the same sort of development.

It was therefore an unavoidable contingency that has resulted in the dual point of view; and, with that settled, further division was made to secure the proper distinction of cases. Where representation is irrespective of expense, four systems have been distinguished: (1) that of state units, under which each state has one vote, proxies being admitted in some instances and the vote being without regard to the actual number

Baron Marschall von Bieberstein (Germany) declared his full acceptance of the British view; he was of the opinion that a delegation which desired to vote ought to be present.

Léon Bourgeois (France) observed that, if he understood correctly the idea of the bureau, this paragraph was designed to give material facilities to the work. But he thought that an interest should be manifested in the sittings of the conference in that respect, and that the paragraph should disappear.

The President consulted the conference upon the suppression of Par. 3, Art. 8. Art. 8, Pars. 1 and 2 were adopted, and Par. 3 suppressed.

[9] Regulations of April 26, 1906, printed in Minutes, Resolutions, Documents, Third International American Conference, 1906, Rio de Janeiro, 1907, pp. 11–21.

[10] See "Fourth International Conference American Republics," by Paul S. Reinsch, 4 JOURNAL, 778, 782, and his Public International Unions, pp. 102–105; S. Doc. 744, 61st Cong., 3rd Session, 32ff.

of men accredited to represent the state; (2) that of representatives, by which each state has one spokesman, who casts an individual ballot; (3) that of the flexible panel, the basis upon which the representation of the proposed Court of Arbitral Justice was founded, involving a membership placed at a constant figure but varying in personnel according to a predetermined scheme of rotation; and (4) that of the simple majority as understood in ordinary parliamentary procedure.

The basis of expense has been cut up into three divisions, which are: (1) that of the voluntary expense unit, under which the assenting states are drawn into classes according to their own choice, the members of each class being responsible for the definite proportion of the financial burden assigned, by their own agreement, to its members; (2) that of equal expenses, under which each state pays the same amount as every other; and (3) that of the expense unit based on size, which is as frequently determined by interest in commerce, railroad properties or such practical undertakings as upon mere millions of inhabitants.

In order to get the largest diversity, both conferences and their established organizations were analyzed, and the dates when they were constituted have been added to give some clue to any tendency of shifting from one practice to another which chronology might offer. Since the question of representation arose in its most acute form at the Second Peace Conference, the various proposals submitted there are included, but in every other case the listing has been confined to conferences or organizations which have existed, or are still in operation.

With this explanation, the meaning of the totals can be read. Forty-five conferences or organizations of an official character were studied and these disclose the following choices for representation:

Voting Power

State unit	18
One representative	5
Flexible panel	5
Majority	1
Total	29

Expense Basis

Voluntary expense units	10
Equality of expenses	4
Expense based on size	7
Total	21

(This tabulation shows that 45 institutions have 50 methods of representation, one of the 45 giving no details on the subject and six detailing both voting power and expense division.)

It may be taken for granted that in every official conference, union, council, bureau or other organization a basis of representation satisfactory to the contracting parties has been evolved and that the principle of equality has been observed in a manner acceptable to them for the purpose they have in mind. Premising the conclusion upon this statement of the case, it is seen that, out of 44 organizations, net, concerning which details are given, 23 based their representation entirely upon voting power, 15 entirely upon expense quotas which are either voluntary or predetermined by specific facts, and 6 resorted to a combination of both systems to secure the result desired.

Here, then, is the extent to which the parliamentary necessities, so to speak, of organizations growing up under the aegis of international law have broken down the Grotian principle of sovereign equality, which he based on the law of nature. Speculation is uncertain, but it is very doubtful if any such diversity would have been found in such organizations a century or even fifty years ago, had conditions made international gatherings and quick communication possible then.

If this assertion stands, it is fair to say that equality of states is no longer the absolute thing the father of international law conceived it to be. Furthermore, it is evident that to those actions of individual states which disregard the strict principle and which writers cite as being in derogation of absolute equality,[11] there should now be added the more important fact that the states themselves have been, and are, meeting and organizing by methods which impose servitudes of considerable significance upon the principle of sovereign equality.

It also follows that the attempt at The Hague to establish Courts of Arbitral Justice and of Prize, notwithstanding that equality of state

[11] See title "equality" in any manual on international law. Inequalities in ceremonial matters, weight of influence, interference in political matters, etc., are numerous. The Near East is frequently subject to dictation from the "great Powers," although Turkey, Greece and the Balkan states are nominally sovereign. The United States frequently enforces its will on Central and South American states, despite their alleged equality. See Wilson & Tucker, 5th edition, 97; Bonfils, 5th edition, §§ 272–8; 1 Moore, Digest of International Law, §§ 62–3; etc.

judges was not to be absolute in them, was nevertheless a move quite in consonance with recent official practice; and it is notable that many smaller states admitted this condition in 1907.[12] Brazil's own strenuous opposition to the scheme was based not so much on her unwillingness to accept the principle as upon her conviction that she herself was to be given, under the proposed plan for the Arbitral Court, a place less important than her own conception of her personal dignity would warrant her to take.[13]

No sharp distinction can be drawn between the two kinds of representation analyzed—by vote and expense—on account of the dissimilarity between the institutions themselves. Some of them, like the Universal Postal Union, depend for their existence upon having an assured income; others, like the Peace Conferences, need not bother about the payment of the bills, because that is attended to individually by the official participants and involves insignificant sums.

But a chronological view of the international organizations is likely to give some clue to the tendency of representative procedure. Here are the schemes adopted by those institutions resorting to two systems:

International Geodetic Association, 1864 (rules revised 1897), state unit and expense quotas based on population; Universal Postal Union, 1869, state units and voluntary expense units; Commission of the International Sugar Union, 1901–2, presumably state units and expenses are set at 3,500 francs per state, except that non-exporting states are called upon to pay only 1,000 francs annually; International Association of

[12] The states to which the principle of rotation was acceptable were: Germany, United States, Argentina, Bulgaria, Chile, Cuba, Spain, France, Great Britain, Italy, Japan, Luxemburg, Montenegro, Norway, Paraguay, Netherlands, Peru, Portugal, Russia, Servia, Siam, Sweden and Turkey. The states which either abstained or reserved as to the principle of equal representation were: Belgium, Bolivia, Brazil, China, Colombia, Denmark, Dominican Republic, Ecuador, Greece, Guatemala, Haiti, Mexico, Nicaragua, Panama, Persia, Roumania, Salvador, Switzerland, Uruguay, Venezuela.

[13] In the final vote on the International Prize Court Convention, Ruy Barbosa made this statement: "The Brazilian delegation, which has applauded the principle and organization of the International Court of Prize, will vote against the project of this court because of the reasons of evident and incontestable injustice against our country which we explained on many occasions without refutation in any part in the *comité d'examen* and in the First Commission."

Seismology, 1903, state unit, with proxy (on constitutional questions), and expense quotas based on population; Brazilian project for Court of Arbitral Justice, 1907, one representative per state and equal expense quotas for contracting parties; Central American Bureau, 1907, one representative per state and equal expense quotas.

Those organizations selecting a voting-power basis are:

Panama Conference, 1826, state unit; Cape Spartel Lighthouse Commission, 1866, one representative; International Telegraphic Conference, 1875, state unit, with proxy; International Weights and Measures Conference, 1875, state unit, colonies being admitted; Literary and Artistic Property Conference, 1884 and 1885, state unit; Kongo Régime Commission, 1885, state unit, no allowance for proxy; Latin Monetary Union, 1885, assigned as flexible panel, emission of coins being based on population; Pan-American Conference, 1889, 1902, 1906, and 1910, state unit; Red Cross Conference, 1892, (semi-official) majority of delegates; Red Cross, Central Committee of Conference, 1892, state unit; Hague Conference, 1899, state unit without proxy; Commission for Exploration of the Sea, 1899, two delegates each, vote presumably by state unit; Pan-American Union Governing Board, 1902, 1906, 1910 (resolutions, and project of convention, 1910), state unit, no proxy; International Sugar Union Conference, 1902, state unit; international Egyptian Sanitary Commission, 1903, one representative; International Radiotelegraphic Conference, 1906, state unit, colonies being entitled to votes up to a limit of six; Geneva Conference, 1906, state unit; Hague Conference, 1907, state unit, no proxy; Hague Court of Arbitral Justice, final vote on 1907 project, flexible panel; International Prize Court, final vote on 1907 project, flexible panel; Central American Conference, 1907, one representative; International Conference on Expositions, 1912, state unit, colonies being entitled to separate votes.

Those organizations, generally of a character different from the foregoing, which have selected an expense basis of representation are:

Riverain Commission of the Rhine, 1814, (revisions in 1831 and 1868), equal expenses; Navigation of River Scheldt, 1839, expense units based on size, each state using the river paying a proportionate capitalized fund toward its maintenance as a waterway; International Telegraphic Bureau, 1868 (also acts under Radiotelegraphic Convention, 1906)

voluntary expense units; International Weights and Measures Bureau, 1875, expense units on size, proportions being based on population of contracting parties; International Literary and Artistic Property Bureau, 1884 (arrangement continued in 1885 and since), voluntary expense units; International Industrial Property Bureau, 1887, voluntary expense units; Pan-American Bureau, 1889, 1902, 1906, and 1910 (resolutions, and also project of convention, 1910), expense units on size; Bureau for Publication of Customs Tariffs, 1890, expense on size, the basis being annual commerce; Central Office of International Transports (European only), 1892, expense units on size, the basis being kilometers of railroads of each contracting party under the convention; Zanzibar Bureau for Repression of the Slave Trade, 1895, equal expenses; International Court for the Peaceful Settlement of Disputes, 1899 and 1907, voluntary expense units; Hague Permanent Bureau, 1899 and 1907, voluntary expense units; International Institute of Agriculture, 1905, voluntary expense units, colonies being separate contracting parties; Pan-American Literary and Artistic Property Bureau, 1906, expense units based on size, the proportions being fixed according to population; Court of Arbitral Justice (Chinese proposal), 1907, court representation based on voluntary expense units; International Sanitary Office, 1907, voluntary expense units; International Sanitary Supervisory Board, 1907, expense units based on quota paid to account of International Office.

About the only evident conclusion from this presentation is that neither law nor custom has been followed, or can be deduced; and, in fact, the foregoing analysis, as well as the whole investigation, has been premised only on the hope of finding a tendency in practice, which this study may assist in hardening into a recognized system.

The facts as just given, however, show nothing so much as a disposition to meet any specific necessity by the application of any scheme that would, at the moment, secure the sanction of these concerned.

Thus it is seen that the dual arrangement of combining voting power and expense contribution can be traced back to 1864, that it appeared at intervals and was made the key to the Brazilian project for the Court of Arbitral Justice in 1907.

The voting-power basis, like the expense-quota a necessary foundation

for representation, naturally shows persistence, was traced back to 1826; and as the equality of states has been the undisputed theory until very recently, it would undoubtedly be found, in the form of one state one vote, in any earlier gatherings.

It is interesting to note that the first attempt found to base expense on an equitable rather than an equal basis was the régime of the river Scheldt in 1839, when the idea of the concert of Europe had taken some shape, and when the concert itself had been tackling the problem of neutralizing Belgium. The previous arrangement of a commission to control traffic on the Rhine, in 1814,—probably not altogether because it presented a simpler case,—settled the expense question by equal division, and the plan has been continued.

There remains the attempt to solve the problem of finding a master system for basis of representation in international organizations. The very large question of politics that must be encountered by any body having to deal with the matter is not to be considered at all, for it involves above everything else the dignity of a state, which may or not feel affronted at an effort to place it exactly where it should be among its contemporaries. Only in the matter of expense do the states seem willing to derogate from their right of equality. In these cases, where it costs money to exert the prerogative of equality, they apparently are quite satisfied to vote according to their voluntary contributions.

A distinction must be clearly appreciated in the following discussion between the different types of international organizations, because, while everything that is said here, aims to have a bearing upon the problem of representation as it arose at The Hague in 1907 and as it will arise later, the condition of accepting a secondary rating in an administrative bureau is absolutely dissimilar from assent to the same rating in a diplomatic conference, and the question of whether the practice of a judicial organization should be assimilated to the practice in conference is, for the purposes of such a study, an open one. I have viewed the official types of organization as a whole, but have tried always to keep their character and the significance of their statutory schemes clearly indicated.

Most significant as a practical policy, perhaps, is the gradual entrance of the colonies into the international administrative organs on a par

with the sovereign state, although the latter does not in any fundamental sense forego its authority. From the point of view of representation, this admission of the subordinate divisions of a state to a full voice means that a state overcomes the equality principle and, for the reason that the colony's interest is likely to be identical with that of the mother country, the parent state is enabled to secure a power corresponding in some degree to its size and importance. This is the only practical trend which is deeply-rooted and which seems practicable of easy development along the line of admitting the dependencies of one state as parties to international agreements, and thereby, without violating the ancient principle of sovereign equality, giving the state whose sovereignty has virtually been peddled out to many subordinate parts a total voice and a total power in some degree commensurate both with its actual importance as a Power and with its economic and diplomatic stake in world affairs.

Eight official international organizations, all of which are administrative or technical rather than diplomatic in character, admit non-sovereign political entities to their membership. The status of a state's possessions, colonies, dependencies or other non-sovereign territories in these varies considerably, and it is well to examine how it happens that they are admitted to such bodies, the extent of their freedom from their sovereigns' dictation, and to indicate as clearly as possible what benefits have resulted from their membership in these organizations.

The organizations taking cognizance of non-sovereign members are the International Institute of Agriculture (1905), International Sanitary Office (1907), and the Bureaus of Publication of Customs Tariffs (1890), Weights and Measures (1875), Postal Union (1869), Telegraphic Union (1868) and the Radiotelegraphic Union (1906); and the International Conference on Expositions (1912).

The Radiotelegraphic Union not only admits colonies as supporters of its bureau, but at the third conference in 1912 they were entitled to send representatives, in accordance with the following provisions:

> Art. 12. [Convention]. * * * If a government adheres to the convention for its colonies, possessions or protectorates, subsequent conferences may determine that the whole or a part of these colonies, possessions or protectorates is to be regarded as forming a country for the

purposes of the foregoing paragraph [which reads: "In the deliberations, each country shall have one vote only"]. But the number of votes which one government, including its colonies, possessions or protectorates, may exercise can not exceed six.

Art. 1. [Final Protocol]. The high contracting parties agree that at the next conference the number of votes which each country shall have shall have been determined at the outset of the deliberations, so that the colonies, possessions or protectorates admitted to the enjoyment of votes may be able to exercise their right of voting throughout all the proceedings of that conference.[14]

These articles were decided on at the second conference in 1906, when the question of representation arose first at the fourth session, October 6, 1906, Art. 15 of the German project being under discussion, and, after an extended argument started by the British delegate, the principle of colonial, or non-sovereign, representation was admitted. The discussion continued at the fifth session, October 8 and at the seventh session, October 25, when the first reading of the revised article embodying the idea was passed. It received its second, or final, reading at the eleventh session, November 1, and passed the *comité de rédaction* without any difficulty. The article as finally accepted became Art. 12 of the convention, certain proposals in the form of amendments being incorporated into Art. 1 of the *protocole final*.

The convention enrolls among its adherents the following, the Roman numerals referring to the bureau classes [15] elected:

Germany, I; Germany, for its protectorates; United States, I; Argentina, I; Australia, I; Austria, I; Belgium, III; Brazil, VI; Bulgaria, V; Chile, III; Cape Colony, Natal and Transvaal, joint, I; Denmark, IV; Spain, II; France, I; Great Britain, I; Great Britain for Canada, Australia, Cape Colony, Natal, Transvaal, British India and its other colonies and protectorates except Newfoundland and Orange River; Greece,—; Hungary, I; British India, I; Italy, I; Japan, I; Mexico, IV; Monaco, VI; Norway, III; New Zealand, IV; Netherlands, III; Persia,—; Portugal, VI; Roumania, III; Russia, I; Sweden, III; Turkey, I; Uruguay, IV.

The countries listed, although several were not represented at the sessions of the conference, assented to the convention within the stipu-

[14] SUPPLEMENT, *3*:330, Foreign Relations, 1906, 1519, and *Annuaire de la Vie internationale*, 1908–1909, 275.

[15] *Rapport de Gestion*, 1909, 2.

lated period and thus became ratifying Powers. In addition,[16] France adhered for all her colonies; Great Britain for the new South African Union; the Netherlands for the Dutch Indies and Curaçao, Austria-Hungary for Bosnia and Herzegovina; Belgium for the Kongo; Japan for Korea, Formosa, Kwangtung and Sakhalin; Spain for Guinea; and Egypt, Morocco, San Marino, Siam, and Zanzibar in their own right.

As a result of experience in the use of radiotelegraphy at sea, it was found desirable to revise the work of the 1906 conference at a series of meetings held at London June 4–July 5, 1912. The question of colonial representation had been in a measure left open for the decision of this second conference by the provisions of Art. 12 of the 1906 convention and the first article of the final protocol, the last paragraph of which reads:

> So far as the next conference is concerned, proposals for the admission of new votes in favor of colonies, possessions, or protectorates which may have adhered to the convention shall be addressed to the international bureau six months at least before the date of meeting of that conference.

Germany, Belgium, France, Great Britain, Japan, the Netherlands and Portugal had complied with this provision and their claims to votes for their colonies were accepted on presentation. Italy, the United States and Russia presented claims to multiple representation, the first two presenting the fact that as they had ratified the convention within less than six months of the beginning of the London Conference, it had been impossible for them to comply with the provision relative to *délai*. The conference rejected this claim. Since, however, the procedure had been adopted in the first place as a transitory scheme, the conference decided to follow the practice of other unions and to write into the convention a statement naming the non-sovereign entities which were entitled to vote. This list was incorporated into Art. 12 and is as follows:

> The following shall be considered as forming a single country for the application of the present article:
> German East Africa; German Southwest Africa; Kamerun; Togo Land; German Protectorates in the Pacific; Alaska, Hawaii and the other American possessions in Polynesia; the Philippine Islands; Porto

[16] 5 JOURNAL, 482; 6 *ibid*, 216, 739, 990; 7 *ibid*, 612.

Rico and the American possessions in the Antilles; the Panama Canal Zone; the Belgian Kongo; the Spanish Colony of the Gulf of Guinea; French East Africa; French Equatorial Africa; Indo-China; Madagascar; Tunis; the Union of South Africa; the Australian Federation; Canada; British India; New Zealand; Eritrea; Italian Somaliland; Chosen, Formosa, Japanese Sakhalin and the leased territory of Kwantung; the Dutch Indies; the Colony of Curaçao; Portuguese West Africa; Portuguese East Africa and the Portuguese possessions in Asia; Russian Central Asia (littoral of the Caspian Sea); Bokhara; Khiva; Western Siberia (littoral of the Arctic Ocean); Eastern Siberia (littoral of the Pacific Ocean).

It is interesting to note in this connection that Germany, France, Great Britain, the United States and Russia each has five colonial votes, bringing the métropole's representation up to the limit of six. Great Britain's relations with her self-governing colonies fixed her multiple representation, and it may be surmised that the other four Powers sought to gain equality of voting strength with her. The non-sovereign participants in the next conference will number 34, whereas the number of metropolitan contractants in 1912 was 26 only. Eleven métropoles out of these 26 are granted multiple representation.

Another change effected was the transference to Art. 16 of a paragraph from the former final protocol which reads:

> The adherence to the convention by the government of a country having colonies, possessions or protectorates shall not carry with it the adherence of its colonies, possessions or protectorates unless a declaration to that effect is made by such government. Such colonies, possessions and protectorates, as a whole or each of them, separately, may form the subject of a separate adherence or a separate denunciation within the provisions of the present article and of Article 22. [17]

Probably the next most significant instance of the admission of colonies,—or as I think is the better description, non-sovereign countries,—into an international organization is found in the International Convention concerning Expositions signed at Berlin October 26, 1912. The

[17] *La Vie internationale*, II, 293–306, *passim*, and 7 SUPPLEMENT, 229. Signatories and adherents to the 1912 convention are noted in 7 JOURNAL, 869. See also S. Doc., 63d Cong., 1st Sess. Bosnia-Herzegovina, Kongo, Egypt, French West Africa, French Equatorial Africa, Indo-China, Madagascar, Tunis, the Union of South Africa, the Australian Federation, Canada, British India, New Zealand, Morocco, the Dutch Indies and Curaçao were separately represented, the other non-sovereigns being represented by delegations jointly with their métropoles.

multiplicity of expositions, frequent failures of them in the last decade or so and the almost inevitable conflict in dates that arises without concerted action are problems which have long been in the minds of their promoters. In public administration the tangible result of the difficulties was the calling of a conference to regulate the practice and national support of these undertakings. The *procès-verbaux* of the proceedings are not yet available, but it is notable that, though no union to exert the control which was agreed upon resulted, the convention consistently employs the word *pays* rather than *Etat* in referring to the contracting parties. Moreover, it specifically arranges for the adhesion of métropoles for their non-sovereign entities. And the final protocol contains two decidedly interesting articles on this matter, in one of which Russia assents to the principle of multiple representation and voting, but reserves the right to enter its subsidiary divisions in sufficient numbers to maintain its voting equality with any other Power, an attitude first taken a few months before at the Radiotelegraphic Conference at London. The applicable articles of the convention are:

Article XXX. Contracting countries have the right to accede at any time to the present convention on behalf of their colonies, possessions, dependencies or protectorates, or on behalf of certain among them.

To this end they may make a general declaration by which all their colonies, possessions, dependencies and protectorates are included in the accession, may name expressly those which are included therein, or indicate those which are excluded therefrom.

This declaration is notified through the diplomatic channel to the German Imperial Government and by it to all the others.

The contracting countries at any time and under the same conditions may denounce the convention on behalf of their colonies, possessions, dependencies and protectorates, for all together or for each one of them separately.

This denunciation is notified through the diplomatic channel to the German Imperial Government three years in advance.

Article XXXI. Each contracting country preserves the liberty of organizing participation in any exposition which takes place in its colonies, possessions, dependencies, and protectorates, whether or not conforming to the provisions of the present convention.

When a contracting country has made use of the right of accession, provided by Article XXX for one of its colonies, possessions, dependencies, or for one of its protectorates, the government of this colony, possession, dependency or this protectorate preserves the liberty of

organizing participation in any exposition which takes place in this contracting country or in its other colonies, possessions, dependencies, and protectorates, whether or not conforming to the provisions of the present convention.

In cases of participation contemplated by the preceding paragraph, the other contracting countries which may be invited to the said expositions preserve on their part every liberty of giving their adhesion thereto and of organizing participation therein under the same conditions.

But it remains understood that expositions mentioned in the present article which may be organized in the territory of the contracting country itself remain controlled by the provisions of the present convention, if they admit foreign participation.

The protocol says:

I. The convention (Article XXX) foresees the adhesion of colonies, possessions, dependencies, and protectorates, without regulating the question of right of voting of these territories in later conferences.

The high contracting parties are agreed in deciding that this question will remain pending and that in the case of such an adhesion it must be regulated through the diplomatic channel before the next conference.

II. Act is taken of the following declarations:

1. The Russian delegation is of the opinion that it would be preferable for each country in later conferences to dispose of only one vote; however, in case of the application of Article I of the present protocol, the Russian Government reserves the right of asking for its protectorates and possessions the maximum of votes conceded to any other Power;

2. The delegation of Denmark in signing the convention declares nevertheless that its signature does not relate to Iceland and the Feroe Island.

3. The British Government reserves the right of adhering for the Island of Cyprus.

These clear-cut conventional provisions providing for colonial representation in conferences seem to be significant of advancing practice, even if the gatherings were made up largely of technical delegates and the subjects under consideration were scientific rather than diplomatic in character. Six other technical conferences have admitted non-sovereigns, the Rome conference on telegraphy in 1871 apparently having led the way by admitting not only colonial administrations but also private companies to membership. The Postal Union followed in 1874 respecting colonies, and the organization for the Publication of Customs Tariffs accepted them as contracting entities in 1888,[18] when,

[18] The conference in that year was a preliminary one, and perhaps for that reason colonial participation in it was significant.

at the conference of Brussels, New Zealand, Queenstown and Victoria took part in addition to their sovereign, Great Britain. Again in 1890 Great Britain was represented not only by her own delegates but also by those of Canada, British India, Australia, Cape of Good Hope, Natal, Newfoundland and New South Wales. At the International Sanitary conference of Paris in 1903 Egypt was represented, although the fact that she is next door to independent, in theory, and is bound by special sanitary rules, makes her appearance less remarkable.

The two conference series considered may be defined as semi-diplomatic at the very least. The other six international organs are more clearly technical, but of them only the Universal Postal Union is absolutely so. It is not the governments themselves but their postal administrations which constitute it, as is instanced in the case of the United States by the fact that the Postmaster General accredits to its conferences. Adequately to discuss non-sovereign membership in those organizations [19] is too great a task for the present purpose, but the following summary will show their status:

UNIVERSAL POSTAL BUREAU. The general convention of Rome says:

Art. 27. The following, for the application of Articles 22 (Bureau maintenance), 25 and 26 (conferences and intercommunication between members), are considered as forming a single country or a single administration: 1. The German protectorates in Africa; 2. The German protectorates in Asia and Australasia; 3. The Empire of British India; 4. The Dominion of Canada; 5. The Commonwealth of Australia with British New Guinea; 6. All the British colonies and protectorates in South Africa; 7. All the other British colonies together; 8. All the insular possessions of the United States of America, comprising specifically the Hawaiian Islands, the Philippine Islands and the islands of Porto Rico and Guam; 9. All the Danish colonies; 10. All the Spanish colonies; 11. Algeria; 12. The French colonies and protectorates in Indo-China; 13. All the other French colonies; 14. All the Italian colonies; 15. All the Dutch colonies; 16. The Portuguese colonies in Africa; 17. All the other Portuguese colonies.[20]

[19] See "Non-Sovereign Representation in Public International Organs" by Denys P. Myers, *Deuxième Congrès mondial des Associations internationales*, 753–802.

[20] Forty separate colonies or combinations of colonies are members of the Universal Postal Union, according to the last available annual report. This would indicate considerable change in the list, though another and probable explanation is furnished by Art. 18 of the réglement which provides for dependencies which are considered as forming part of their métropoles.

Art. 18 of the convention says: "Each country has one vote" in the triennial congress. Presumably the choice of the word country (*pays*) instead of state (*état*) in this connection is deliberate.

UNIVERSAL TELEGRAPHIC BUREAU. Australia, South African Union and British India, each, class 1, 25 units; Dutch Indies, class 3, 15 units; Egypt, French Indo-China, Morocco, and New Zealand, each, class 4, 10 units; Bosnia-Herzegovina, Madagascar, Portuguese colonies, Senegal and Tunisia, each, class 5, 5 units; Belgian Kongo, Ceylon, Crete, Eritrea, Iceland, New Caledonia, class 6, 3 units.

Art. 16 of the convention says: "In the deliberations (of the conference), each administration has the right to one vote, under reserve, if it acts for different administrations of the same government, that the request has been made by the diplomatic channel of the government of the country where the conference is to assemble, before the date fixed for its opening, and that each of them has a special and separate representation."

WEIGHTS AND MEASURES. In this union Austria and Hungary are separately represented, as were Sweden and Norway before their formal separation. British India and Tunisia participate in the conferences, in which Baron von Wrede was an honorary member in 1883 and Prof. A. A. Michelson of Chicago in 1905. It is also customary to issue invitations to the conferences in the case of experts designated by their fitness to advise.

As to the bureau of the union, Art. 20 of the regulations says in part:

> If a state which has adhered to the convention declares its desire to extend the benefit to one or more of its colonies which are not autonomous, the figure of the population of the said colonies will be added to that of the state for the calculation of the scale of contributions.
>
> When an autonomous colony desires to adhere to the convention, it will be considered, so far as concerns its entry into this convention, following the decision of the mother country, either as a dependent thereof or as a contracting state. [21]

INTERNATIONAL INSTITUTE OF AGRICULTURE. At the Rome conference in 1905 which resulted in the formation of this organization, Egypt was represented by its own delegate, while an Italian delegate repre-

[21] *Annuaire de la Vie internationale*, 1908–1909, 320.

sented Ethiopia, an actually sovereign state. Art. 10 of the constituent convention says:

"Colonies may, at the request of the nations to which they belong, be admitted to form part of the Institute on the same condition as independent nations." Art. 3 says: "The general assembly of the Institute shall be composed of the representatives of the adhering governments."

Australia, Canada, British India, New Zealand, Mauritius, the South African Union, Tunisia, Algeria, Eritrea and Italian Somaliland are the 10 non-sovereign territories now adhering to the work of the Institute, their position in it depending upon the quotas paid, which determine rank for classifying all members of the Institute and the number of the votes of each. It may be predicted that colonial representation will rapidly increase in this public union.

BUREAU FOR PUBLICATION OF CUSTOM TARIFFS. The basis of representation in this organization from its beginning has been the possession of a tariff, not political condition. As early as 1890, two years after the proposal of the union was made, 72 "countries or colonies" had adhered in principle. Publication of tariffs began on January 1, 1891, and on January 1, 1911, twenty years later, the bulletin of the union had published the tariffs of 158 separate political divisions of the world. How extensively it deals with non-sovereigns can be recognized from the fact that there are something like fifty sovereign states in existence.

INTERNATIONAL SANITARY CONFERENCE. At the fourth conference in 1874, Egypt, whose affairs were discussed, was represented. At the ninth conference in 1894 British India participated in its own right and a British declaration [22] excepted Canada, Newfoundland, the Cape of Good Hope, Natal, New South Wales, Victoria, Queensland, Tasmania, South Australia, Western Australia and New Zealand from the provisions of the convention unless "in their name, a notification to that effect shall have been addressed by Her Britannic Majesty's representative at Paris to the French minister of foreign affairs." [23] Great Britain as

[22] British Treaty Series, No. 8, 1899, page 41.

[23] This is, to my knowledge, the first instance of such differentiation in respect to an international convention. Separate colonial adherences to British, French, German and American bipartite treaties are now customary and are very numerous in the case of multipartite conventions. This custom gives color to the argument ad-

the métropole later notified the application of the convention to Cape Colony, Newfoundland, West Australia, Jamaica, the Windward Islands, Saint Helena and the Gold Coast. At the tenth conference in 1897 Egypt and the principality of Bulgaria were represented, but their delegates were not recorded in the alphabetic list of participants, being noted at the end of the general list.[24] At the eleventh conference in 1903 no non-sovereign countries participated.

This is the extent of the admission of colonies into international affairs, and in this connection it is interesting to note the contents of a British Parliamentary Paper (Cd. 129, 1910) which was summarized in the London *Times* (Weekly Edition), June 3, 1910, page 410, with editorial in the same number. The correspondence reported a letter of June 28, 1895, by the Marquess of Ripon, Secretary of State for Foreign Affairs, in which he said:

> A foreign Power can only be approached through Her Majesty's representative, and any agreement entered into with it, affecting any part of Her Majesty's dominion, is an agreement between her Majesty and the sovereign of the foreign state, and it is to Her Majesty's Government that the foreign state would apply in case of any question arising under it.
>
> To give the colonies the power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate and sovereign states, and would be equivalent to breaking up the Empire into a number of independent states, a result which Her Majesty's Government are satisfied would be injurious equally to the colonies and to the mother country, and would be desired by neither.

Commenting on this letter in a despatch to the *chargé d'affaires* at Paris on July 4, 1907, Sir Edward Grey said:

> I do not, however, think it necessary to adhere in the present case (negotiation of a Franco-Canadian commercial agreement) to the strict letter of this regulation, the object of which was to secure that negotiations should not be entered into and carried through by a colony unknown to and independent of His Majesty's Government.
>
> The selection of the negotiator is principally a matter of convenience,

vanced here that multiple representation is likely to hinge on giving non-sovereign entities separate representation.

[24] It may be recalled that the same distinction was made in the official reports of the First Hague Conference in the case of Bulgaria.

and, in the present circumstances, it will obviously be more practical that the negotiations should be left to Sir W. Laurier and to the Canadian Minister of Finance, who will doubtless keep you informed of their progress.

If the negotiations are brought to a conclusion at Paris, you should sign the agreement jointly with the Canadian negotiator, who would be given full powers for the purpose.

The *Times* adds: "In a subsequent despatch the British Ambassador was authorized to agree, without any reference to the Secretary of State, to any verbal alterations in the text of the convention which the Canadian delegates might desire to make or accept." Here is a clear indication of a non-sovereign autonomy practically complete even concerning the negotiation of a treaty, and, as has just been shown, the colonial representation and independent voting power is already a reality in respect to administrative affairs. In the light of these practices, it is not unreasonable to expect an application for the admission of colonies into the diplomatic conferences of the future, not merely those dealing with technical negotiations, but also those deciding on legal questions.

The self-governing parts of the British Empire have held an Imperial Conference in which the colonies discussed and negotiated as equals of the mother country, and since they have begun establishing their own armies and navies according to their specific needs, rather than as adjuncts of the British forces, the argument that they would be as much concerned with the legal problems of a Court of Arbitral Justice or an International Prize Court as any independent state would be a difficult one to rebut, being both new as an attack on the absolute equality theory and entirely logical in principle. Here is not the place to go farther into this important question. It is sufficient to state what is evidently a tendency and to hint that, in view of the past, the admission of colonial diplomatic delegates, probably with rank as ministers plenipotentiary in distinction from the ambassadors *ad hoc* of the mother country, is not at all an unlikely development of the future. In such a case, granting them a separate vote could be refused only with the greatest practical difficulty.

The subject is worthy of much closer study and keener analysis than the writer's ability permits him to give it, but to him the fact seems

patent that the necessity for representation in international organizations has brought forward what is practically a new voice in international relations, the non-sovereign territory. And this fact, applied to the practical matter of juridic equality, seems to warrant certain conclusions which are likely to have an important bearing upon the development of representation in conferences. Descriptively phrased these conclusions are:

1. Short of diplomatic participation and so long as it is definitely understood that the basis or object of the organization is administrative rather than diplomatic, there seems to be no inclination to exclude non-sovereigns from international organs. The test in this connection seems to be that the non-sovereign shall possess a distinct administrative department properly coming within the scope of the organ.

2. Self-governing non-sovereigns, which, in the British Empire, have practically assumed independent status except for a common bond of imperial interest, are showing a disposition to participate in international organs in a more definite manner than by the present theoretical representation through the diplomats of the actual sovereign. For the present, this tendency is satisfied by means of consultation and discussion of policy around what may be termed the family table of the sovereign. Self-governing non-sovereigns, however, are likely to have interests very diverse from the sovereign, and it is a grave question whether these interests can be successfully espoused through the envoys of the latter, especially when the actual political bond in all other respects is so tenuous. The problem of the admission of self-governing non-sovereigns is almost sure to come before international diplomatic conferences in the future, because of a presumptive desire of the sovereign to exert a voting power more in accordance with its actual importance than can be granted under the present system, and also to avoid the unsatisfactory necessity of representing, at second hand, the interests of considerable territories which practically control their own affairs.

DENYS P. MYERS.

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EDITORIAL COMMENT

THE EIGHTH ANNUAL MEETING OF THE SOCIETY

The Eighth Annual Meeting of the Society will be held this year as usual during the last week of April.

The Committee on the Eighth Annual Meeting has decided to divide the sessions into three groups for the separate consideration of three different subjects which the Committee has deemed it advisable that the Society should consider.

In the first place, the prominence given by recent events to the Monroe Doctrine and its application, led the Committee to decide that a thorough discussion of the Monroe Doctrine in all its phases by competent and impartial speakers would be a useful piece of work for the Society to undertake. It is expected that the subject will be subdivided

into topics which will allow separate treatment of the history of the inception of the doctrine, of its history during certain periods of time, and of examples of its practical application. It is also expected that other topics will include misconceptions and misapplications of the doctrine, and the attitude of other governments toward it. The topics and speakers have not yet been arranged by the Committee, but as soon as they are arranged tentative programs will be sent to the members of the Society.

Secondly, the Committee decided to accede to a request of the Carnegie Endowment for International Peace, made through the Director of its Division of International Law, that the Society place upon the program of its Eighth Annual Meeting the subject of the teaching of international law in American institutions of learning. It appears that the Endowment is working upon a "plan for the propagation, development, maintenance and increase of sound, progressive and fruitful ideas on the subject of arbitration and international law and history as connected with arbitration." The Endowment desires the Society to cooperate in carrying out this plan by placing the above mentioned subject on the program of its next annual meeting and inviting the teachers of international law and the deans of all law schools in which international law is not now taught to attend the meeting and participate in the discussions, the travelling expenses of such instructors to be paid by the Endowment. A list of seven specific questions which the conference of teachers will be asked to consider is included in the communication from the Endowment. These questions will be printed in the tentative program. The Endowment also requested permission from the Society to circulate at the Endowment's expense among the educational institutions of the country the Proceedings of the next annual meeting containing the discussions and conclusions on the questions referred to.

The third subject to be considered at the meeting will be the report of the Committee on Codification, which the Committee on the Annual Meeting understands the Committee on Codification is now ready to make.

It is expected that this program will make it necessary to add a day to the length of the meeting, so that instead of opening on Thursday night as heretofore, the meeting will begin on Wednesday night, April 22nd, at 8 o'clock, continue throughout Thursday, Friday, and Saturday morning and end with a banquet on Saturday evening April 25th.

The three evening sessions will be devoted to the consideration of the Monroe Doctrine, the morning and afternoon sessions of Thursday and Friday will be taken up with the consideration of the subject of the teaching of international law in American institutions of learning, and the session of Saturday morning will be devoted to the report of the Committee on Codification and to the business of the Society. The meeting will be held this year at the New Willard Hotel.

All members who can possibly do so are urged to attend the annual meeting. The subjects should interest every international lawyer and every teacher and student of international law. They will be presented by men of authority and ability, and all members who desire to discuss the questions will be at liberty to do so after the formal papers are read. The printed proceedings for this year should form one of the most valuable publications of the Society. In addition, the annual banquet is always a most enjoyable ending to the meeting. It is expected that the annual banquet will be up to the high standard already set for the excellence and prominence of the speakers.

MR. BACON'S MISSION TO LATIN AMERICA

Last fall the Honorable Robert Bacon, formerly Secretary of State and Ambassador to France, undertook a journey to South America on a mission for the Carnegie Endowment for International Peace, "to secure the interest and sympathy of the leaders of opinion in the principal Latin American Republics, in the various enterprises for the advancement of international peace which the Endowment is seeking to promote; and by means of personal intercourse and explanation to bring about practical coöperation" in these undertakings. With the exception of Mr. Root's official visit, as Secretary of State in 1906, no journey by a citizen of the United States has done quite so much to encourage and stimulate the development of cordial and helpful international relations between the republics of North and South America, as this memorable trip of Mr. Bacon. He visited Brazil, Argentina, Uruguay, Chile and Peru, being prevented by difficulties in arranging steamship and railroad connections from visiting the other countries as planned in his itinerary. In each country visited, Mr. Bacon was received with the utmost cordiality by the government, and officially entertained. The diplomatic representatives of the United States did everything in their power to render his stay in the capital cities effective of results; and

prominent citizens representing all elements of the business, professional and social life vied with each other in imparting to his mission the dignity and significance which its importance bespoke. The University of Santiago gave him an honorary degree, as did also the University of Lima; and various scientific and legal societies elected him to honorary membership. His mission was everywhere welcomed sympathetically in the newspaper press, which fully reported his public addresses. The success of his mission was greatly promoted by his ability to address his audiences in the Spanish, Portuguese and French languages.

Mr. Bacon's more important addresses were delivered in Rio de Janeiro, under the auspices of the Brazilian Academy, the Institute of the Order of Advocates, and also at the American Embassy; in Montevideo at the Ataneo, under the auspices of the University; in Buenos Aires, before the Faculty of Law of the University; in Santiago, at the University of Chile; and in Lima, at the University of San Marcos and before the Colegio de Abogados.

In each of these addresses and in his numerous conferences with the government officials, with educators and distinguished citizens, Mr. Bacon directed attention to certain of the specific plans of the Endowment, one of the most important of these being the formation of national societies to be affiliated with the American Institute of International Law. In each country visited, committees were at once appointed to organize such societies, and in several of them the organization has already been effected. This feature of Mr. Bacon's work is of especial interest to the readers of this JOURNAL; and we may safely predict that as a result of it this promising institution will soon become an actual reality, establishing a new point of contact and a new bond of sympathy between the jurists and the statesmen of the northern and southern hemispheres. Both political circumstances and geographic situation have created new and special conditions, making possible understandings which, while not inconsistent with or antagonistic to the principles of European international law, permit agreements upon matters regarding which the rest of the world cannot yet agree. A distinguished professor of law at Padua stated the case concisely and completely, when he said that "the probable coöperation of two autonomous institutes is preferable to the practically impossible collaboration between dissimilar elements of the same association."

Mr. Bacon suggested the active participation of the several govern-

ments in the proposed Academy of International Law at The Hague, and we may anticipate the cordial acceptance by each of the formal invitation to this end. His suggestion that the Latin American states appoint committees for the consideration of contributions to the program of the Third Hague Conference and the intercommunication of such committees among all the American countries, excited unusual interest, especially in Brazil, where it is expected that steps to this end will be taken at once. He was also most fortunate in his appeal for the organization of national branches of the Society for International Conciliation, to be affiliated with those in Paris and New York. In four of the countries visited competent and energetic organizing secretaries have already been appointed and are at work. While the South Americans have not taken kindly to peace societies, of the ordinary pacifist kind, they quickly respond to the principle upon which the Conciliation was founded, which looks to the friendly adjustment of international quarrels through arbitration and other similar methods.

Mr. Bacon discussed fully the plans of the Endowment for the exchange of visits of representative men between the two continents, and also the proposed exchange of professors and students. Each of these projects met with sympathetic response, and Mr. Bacon reports that the time is already ripe for the inauguration of the exchange of professors. One difficulty presents itself in the limited number of Latin Americans who have a speaking knowledge of English, and on the other hand the equally limited number of North Americans who are familiar with Spanish. This difficulty in the way of closer intercourse between the two continents we are at length beginning to realize; it is a great mission of our higher educational institutions to gradually overcome it.

It thus appears that Mr. Bacon's mission to South America was most successful, in the sense that it is to bear immediate fruit. It was apparent to his hosts that he came with no selfish purposes,—not to seek concessions, not to solicit business advantages, but upon an errand purely altruistic in the highest significance of the word. He carried a message of friendship and coöperation in a work which is not for the benefit of one country, but of all the Americas and all the world. He sowed the seeds of a new and finer international relationship, and the results of his trip can hardly fail to be the establishment of intellectual currents of sympathy, leading to a higher and nobler civilization.

PEACE THROUGH THE DEVELOPMENT OF INTERNATIONAL LAW

In opening the Twentieth World Peace Conference at The Hague on August 20, 1913, the eminent Dutch professor and publicist, Dr. de Louter, delivered a remarkable address, in which he criticized the attempt of many peace-loving people to bring about peace by revolution instead of by the slow, inconspicuous, but sure method of the evolution of law.

"Neither the abrogation of war," he said, "by official decree, nor the establishment of a supranational state, nor a change in government or in any social organization, can smooth the path to peace and put an end to the fighting instinct. There is but one way to accomplish this; it may be troublous, but it is sure; it is the way of right; not of a theoretical and imaginary right, but positive and real. A peace which does not spring from that which is right, which does not have right as its basis and guarantee, is worthless; it is worthy neither of your sympathies nor your efforts. It rests on a fragile and unstable basis; it depends on precarious eventualities, and is threatened with destruction at any moment. It sacrifices matters of primary importance to conditions of only secondary importance, whose moral value is of no account except as it is the fruition of the reign of right.

"There are those, however, who will ask 'what is that right whose praises you sing,' and declare that 'those who favor a World State are aiming at that very result.' In my opinion, ladies and gentlemen, right is first of all identical with the respect due to the existence of the present nations, with the conviction that they are living organisms, the fruits of nature and history; and in the second place, right means the unreserved recognition of the international bonds into which these nations enter in full liberty. Scarcely felt in the beginning, these relations increase constantly and assume different aspects. Just now they have reached a range and importance that are really wonderful. The future is full of promise. But,—and this is their important feature,—all these relations have their origin in the free action of independent states. The scrupulous respect for the juridical equality of the states is the starting point of any structure aiming at right between the nations. No departure from this principle can be admitted; neither the hegemony of one or of several states, nor the absolute submission to any authority whatever. When we do away with the equality or the sovereignty of the states, we strike at the very vitals of international law. Right is but a

phrase, and peace a chimera, if these fundamental rights are not considered inviolable.

"In consequence, international law can only be developed through the rational and voluntary action of independent states. These states alone establish right by means of collective conventions, which enforce this right through common agencies and protect it by means of arbitral and judicial institutions of an international character. International coöperation has established admirable institutions, such as treaties, which, by their tenor and importance, have suggested the idea of laws, and have been called treaties that engender international law, and sometimes are referred to by the misnomer *treaty laws;* international bureaus, dealing with administrative duties reaching beyond the national frontiers and spreading the benefits of civilization over areas including several states; arbitration and judicial courts that have already unraveled many complications and settled many dangerous disputes.

"This structure, which rests on deep-laid foundations and is being added to constantly, has made enormous progress. Yet it is purely voluntary and will not brook constraint. Being of an ethical origin it proceeds step by step, and continuing its salutary course, it will of necessity instill principles of morality and justice into the minds and into the hearts of the peoples and their leaders. Ladies and gentlemen, it is for you and our congresses, representing the cause of pacifism, to accelerate this process of infiltration into public opinion. It will be the office of the states themselves to glean the fruits of your efforts and to convert them into juridical relations and institutions.

"This marvelous evolution is taking place under our very eyes; it outlives temporary disappointments and controls troublesome incidents; it invades more and more the delicate domain of politics; it represents the sympathies of the peoples and the requirements of real life. Such is the true and salutary internationalism, the result of recent progress, the hope of the future and the precursor of the fraternity of nations. Satisfied to be the modest collaborators in this mission of organic process, let us move onward and never retrace a single step; but let us also be patient and avoid precipitate action which builds castles in the air!"

In the course of his address he adverted to three movements full of hope and promise, and it is pleasing to the American reader to note that the three are of American origin and that the distinguished European publicist looks to the western world for leadership in the cause of international peace.

"Let us look westward," he says, "to the hemisphere which, in the eyes of old Europe, seems the appointed heir to all the blessings of the promised land of ages ago. There, international wars have about disappeared; the antagonism of nationalities which, for a long time, separated Central and South America from the great Anglo-Saxon Republic in the north, is gradually dying out because of the birth of an ever-increasing sentiment of a continental unity of interests which makes closer union possible and creates superb institutions. Allow me to cite three great examples of this movement.

"In the first place, young America has shouldered the stupendous task of codifying international law. Whilst, for more than a century, both in Europe and elsewhere, this codification fired the ambition of a handful of scholars not afraid to compile codes of customary laws, whose gaps they bridged with their individual notions of a theoretical law, Americans have realized that such a method can only beget doubtful results, and reached the conclusion that the only way in which to codify sets of laws is to seek the coöperation of the real legislators, that is, the states represented by their delegates. At the Second Pan American Conference, which met at Mexico City in 1901, Brazilian initiative led to a resolution which became the basis of a definitive treaty, by which the Secretary of State of the United States and the Ministers of the American Republics accredited to Washington were requested to appoint a committee of from five to seven jurisconsults for the elaboration of two codes of international law, one of private law, the other of public law, which were thenceforth to govern the relations between the American nations.

"The Third Pan American Conference, held at Rio de Janeiro in 1906, modified this project by substituting, in the place of the committee formed of a few jurisconsults accredited to Washington, an assembly of jurisconsults, delegated one each by all the American countries. It is this slightly enlarged assembly, representing, with but few exceptions, all the American countries, which met at Rio de Janeiro, June 26, 1912, and after continuous labors extending over nearly three weeks, succeeded in determining the bases for a veritable codification which is to present in the form of independent conventions, interconnected with some unity, not the more or less ingenious philosophic or moral notions of irresponsible publicists, but the rules of conduct corresponding to reality—that is, to the international life of the American nations. To accomplish this task, a careful study of the needs and real aspirations

of these nations will precede the actual undertaking of the great work.

"It is impossible to exaggerate the importance of such an enterprise. We cannot fail to realize the difference between individual and arbitrary efforts at codification and the admirable accord existing between representative men of an entire continent, coöperating with one another for the realization of a glorious and truly constructive work. The preparations that have been made for this work, the discussions that have taken place and the resolutions that have been adopted, in short, the entire process strictly carried out, are the irrefragable proof of a determined resolution and of high and boundless aspirations. Latin America which, through the talent and eloquence of its delegates, somewhat surprised European diplomacy at the time of the Second Peace Conference, has displayed since then an activity and fecundity both humiliating and encouraging to their predecessors. Those whose efforts are devoted to the establishment of an era of peace founded upon right cannot but express their hearty approval of the vigorous workmen beyond the sea, busy in laying the solid foundations for an edifice of law, instead of indulging in the ephemeral fantasy of well meant and unproductive intentions.

"The second illustration is furnished by an essentially scientific Institute, whose moral influence and effect are not less important. The gradual coming together of North and South America has called into existence a new agency of progress. The projects for a Pan American Union which have been discussed for a long time, but never practically realized, have at last led to a definite result within the peaceful field of scholarly pursuits, thanks to the talent and perseverance of two illustrious men from the two halves of the hemisphere. In the course of the past year Dr. James Brown Scott, the distinguished jurisconsult of the United States, and Mr. Alejandro Alvarez, formerly a professor and at present counselor to the Chilean Ministry of Foreign Affairs, who, in June, 1912, had brought to bear a salutary influence at Rio upon the plan of codification, have, after a personal meeting at Washington, founded in the latter place in October, 1912, 'The American Institute of International Law.' This Institute has for its object: first, to contribute to the development of international law; second, to crystallize the common sentiment for international justice; third, to promote pacific settlement of all international disputes arising between the American countries. This luminous plan was born of the conviction that it is better

to foster ideas of right and justice through slow but constant infusion into the minds and hearts of the peoples, than through diplomatic negotiations not based upon a general, popular feeling.

"When it is understood that the pacifist movement is more general in America than in any other country, and rests either on a religious basis or upon a community of interests and of tendencies worthy of envy, we can best appreciate this new evidence of vigorous progress which has come to us from the other side of the ocean; it puts new life into our hopes and gives fresh impetus to our efforts.

"I take my third illustration from the generosity and foresight of a private individual. You know that a citizen of the great Anglo-Saxon Republic has made over a part of his wealth to the promotion of international peace. He has established an 'Endowment for International Peace,' and found men competent to carry out his generous projects. These men had but just entered into their functions, when they displayed an astonishing activity. The income of the millons which they have agreed to administer has been directed to various agencies for the promotion of the intellectual and moral cause of pacifism. A world library has been established; a collection of all the arbitral awards is in preparation; another collection, including all arbitration treaties from the remotest times to the present day, has been planned, and the creation of an Academy of International Law is under consideration; subventions have been granted to periodical publications in various countries and published in different languages, which make it their object to study international law but whose pecuniary status does not allow the editors to pay *honoraria* securing them contributions of the highest order, or whose income is not quite sufficient to meet present expenses. The Trustees of the Endowment have gone farther yet. They have entered into close relation with the Institute of International Law, which is to be its adviser in scientific questions, and which has accepted a moderate subsidy to meet the traveling expenses of the members who desire to be present at the sessions of the Institute, occurring in the various capitals of Europe, but who feel that they cannot incur the large expenses of sojourn abroad. Thus the treasures reaped from industry and commerce have been placed at the service, not of war, but of peace."

It is not for us of the western world to question whether the European publicist speaks the language of sober truth or of pardonable exaggeration. The fact that such a man as Professor de Louter believes what he says, and others share his belief, should encourage us to persevere and

to deserve the praise which he so generously lavishes upon us. To be thought worthy is an incentive to worthy actions, and who knows but crediting us with leadership may make us more worthy of leadership.

AMERICAN UNITY

In the *Figaro* for October 24, 1913, the distinguished statesman, diplomatist and historian, Monsieur Gabriel Hanotaux, Member of the French Academy, took advantage of Mr. Robert Bacon's visit to South America to express himself at length on the subject of American unity. The article is so interesting, so timely and so suggestive that the JOURNAL has translated it from the French and prints it in full, without marring its symmetry and beauty by a word of comment or feeble praise:

Behold the structure conceived by Ferdinand de Lesseps! it is a reality. The Panama Canal has wedded the waters of the Atlantic and Pacific oceans. The event marks the greatest geographic transformation that could be accomplished on the surface of the globe. We have been its witnesses; yet we can have no adequate idea of its greatness, and give but little thought to the consequences that are likely to follow.

This is generally true of all great human affairs; the living witnesses take only a passing interest in matters at which posterity will gaze in wonder. It is this that makes the writing of history difficult; the present does not grasp the exact proportions of things extending into the future; by a singular slip of memory, the present, if I may venture to say so, is oblivious of the future; and from the mass of rubbish recorded on its pages, the historian finds it difficult to sift the facts worthy to be remembered.

We have even now reason to believe that, paradoxical though it may seem, the main result of the stupendous work—the great divide made in the American hemisphere—will be to strengthen its unity. The fact is that the two shores, the Atlantic and the Pacific, were separated by a huge mass of earth stretching across that part of our planet. A gate has been cut through it, and the opposite shores are brought nearer to each other; in their future relations they form, as it were, the four arms of an X, connected by the point of intersection. Communications of every kind are going to be doubled or quadrupled; in consequence, a remarkable growth of unity will take place; America is somehow going to become twice or four times more American than in the past.

This is evidently one of the ideas that keeps the transatlantic master-minds constantly occupied; they have a subconscious prescience of great changes that are to take place; as thinkers and men of action always "at the fore," they bend their energies to finding out how best to steer the course of these impending changes. Are we to remain in ignorance of these powerful agencies—like so many bridges, figuratively speaking—which they are endeavoring to throw across the gulf separating the present from the future?

It will perhaps be opportune at this time to inquire if there is *one* American people? if there is *one* American mind? And by this we do not of course mean one North American people, or one North American mind, but one homogeneous people, scattered over the entire continent, and animated by one standard of mind, the American mind. In short, will the course of future American affairs tend toward Pan Americanism? We can readily see that the answer to this question is of vital importance to America itself; in another part of this article I shall show in what way it is of interest to Europe, and especially to France.

There undoubtedly exist peculiar analogies and close resemblances between the various American peoples, even between the descendants of different races, reared under different social systems and speaking different languages. Whether North Americans or South Americans, whether Anglo-Saxon Americans or Latin Americans, it is a fact that in the one and in the other of the Americas, civilization is not an old civilization slowly evolved on the native soil; it is a recent civilization, transplanted ready-made from the old world; in both Americas the autochthonous races are being swept away by the ever rising tide of an emigration to which all European peoples contribute: America is the *in globo* legatee of all European nations. In consequence, and ever since the proclamation of their independence, all American populations have recognized but one system of government, that of democracy; and living under republican institutions, they have in most cases organized or are tending to organize themselves into confederations of states. These are striking characteristics and remarkable analogies in the progress of intellectual evolution, bringing these peoples into close political kinship, and distinguishing them, at all events, from the European peoples. On the basis of these similarities and the latent processes of unification, some American theorists justify the Monroe doctrine; while others, with greater moderation, evidencing a less exclusive European tendency, are endeavoring to create the agencies that are to assist the nascent American unity to reach its maturity; they are engaged in establishing an Academy, a sort of Institute of the American mind. Inasmuch, however, as the intellectual current on the new continent runs preëminently along juridical lines, this Academy is to devote itself to the study of international law, and in its first stages to deal primarily with Pan American problems. Men like Mr. Elihu Root, Mr. James Brown Scott and Mr. Alejandro Alvarez, hailing from different American nations, have combined to promote this work; and it will be remembered that but recently to Mr. Robert Bacon has been entrusted the high mission to visit South America in order to lay the foundations of the new institution.

It is quite evident, as Mr. Rodriguez Larreta so justly stated, that in its essence, law is one and universal; *among civilized nations there is only one international law;* but international law has not nearly passed through all the various necessary stages to enable it to leave the field of theory and enter that of practice. The founders of the American International Institute, are looking for practical results. On a basis of absolute equality, they have invited all the Republics to coöperate in the study of problems and in the codification of regulations of particular interest and importance to America. In this way, and beyond the Atlantic, the Institute of International Law, founded by Rolin-Jaequemyns, will find, not a competitor, but a force contributing to the development of international law, with the additional result, that juridical unity will lead to a still higher conception, that of a great, future UNITY.

It is needless to remark that the nations of Europe in general, and France in particular, should take a deep interest in these projects. France, especially, must not remain in ignorance of *efforts toward unity* exerted in any part of the world. France has at all times been a leader in the movement for unity; eminently centralizing in her tendencies, France is deeply interested in following movements of this nature taking place elsewhere. But there are still more immediate and real considerations; all efforts making for the intellectual unity of America must, in a measure, follow a course influenced by French thought.

This was explained to me recently by the distinguished Chilean, Mr. Alvarez, one of the founders of the Academy, who said: "All matters of common interest to the American continent, and not of special interest to this or to that country, must be reduced to terms of the French language, of the French intellect and French books. When we see a group of people composed of Chileans or Argentines speaking the Spanish language, and still influenced by intellectual currents from Spain, of Brazilians speaking Portuguese, and subject to intellectual currents from Portugal, and of North Americans speaking English, and still influenced by English thought, and we should try to find out what it is that enables them to maintain a certain unity of views and tendencies, we are forced to acknowledge that French ideas, French things and French books create that common basis. This is to some extent shown by the fact that in South America at the present time, seventy-five per cent of all foreign books are French. There is in consequence no better way for France to exert her influence upon the North American mind than by availing herself of this South American medium; it is quite evident, also, that if Americans wish to understand each other perfectly, the best way for them to do so, will be to welcome the intellectual influence of France. On the eve of his departure to fulfill his mission in South America, Mr. Robert Bacon himself stated that before the North American thought receives its exequatur in South America, it must first have passed through the crucible of Paris.

The first effect of this movement for unification which is so peculiarly French has been the choice of the language which is to do service as interpreter of the institution; the French language has been chosen for the reason that in America there is no other universal language. North Americans do not understand Spanish and Portuguese; South Americans but rarely understand English. And so, after a discussion which had developed much opposition, it was decided, in order to obviate utter cacophony, to write and print all books and publications of the Institute in the French language. And, as an almost necessary climax, the headquarters of the bureau are located in Paris.

Not by our own action, but by the force of circumstances, Paris has once more been recognized as the center of intellectual radiation. Does not every one of us realize that it is to our interest, if the mold of this Pan American unity, which some day is destined to reach enormous significance, even though it be not French all through, will nevertheless show the earmarks of French workmanship and French genius?

In the many transformations taking place on the face of the globe, we should remember that when a nation is thrown on its own forces and resources, it counts for little; but we know also the power and development accruing to the nation that knows, at the opportune moment, how to bring to bear its action and influence upon

those creations of lofty purpose built within the realm of the intellect, defying the vicissitudes of time and the onslaughts of the elements.

NOTE TO THE MACLEOD CASE [1]

[Printed in Judicial Decisions, this JOURNAL, p. 158]

As to third parties, or as to individual rights, the title to the Island of Cebu did not vest in the United States until the exchange of ratifications by the signatory parties April 11, 1899. Haver *v.* Yaker, 9 Wall., 32; Dooley *v.* United States, 182 U. S., 222–230. It follows that all rights to do business in the port of Cebu remained intact until its occupancy and possession by the United States, February 22, 1899, which rights necessarily included the right to import and sell rice, for rice is not contraband of war, it being classed as food or provision. Wheaton's Int. Law (3rd ed.), pp. 640–642, 654; 7 Moore's Dig. Int. Law, pp. 675–692; Hall's Int. Law (4th ed.), pp. 687, 689.

The Court of Claims found in the principal case (45 C. Cls., 339) that the Spanish flag was hauled down and the Spanish forces, civil and military, evacuated the Island of Cebu December 25, 1898, and two days later the so-called republic, of which Aguinaldo was the head, took possession of the island and proceeded to administer its public affairs, maintain a government at Cebu, and collect customs until the 22nd of February following, when possession was surrendered to the United States. At no time prior to February 22, had an officer of the United States, either civil or military, or any armed force of the United States been in the Island of Cebu, nor had the United States been in possession or occupation of the port of Cebu or any part of the island. (*Ibid.*, 344.)

In that condition of things, the payment of duties to the *de facto* government then in possession of the port of Cebu was lawful and within the doctrine that has been applied and enforced more than once by the United States in its dealings with other nations. The executive order of July 12, 1898, contained an expression of principle universally recognized in international law. "Rights which are founded upon mere force reach their natural limit at the point where the force ceases to be efficient." Hall's Int. Law (5th ed.), p. 448. The executive order did not extend to or apply to ports or places not actually occupied or possessed by the United States. The principal case puts this proposition beyond

[1] Prepared by Mr. L. T. Michener, of the Washington Bar, of counsel in the case.

question. To make assurance doubly sure, the Secretary of War, in promulgating that executive order, made this one: "Upon the occupation of any ports or places in the Philippine Islands by the forces of the United States, the foregoing order shall be proclaimed and enforced." (45 C. Cls., 343.) The act of the Secretary was the act of the President. Evidently, it was the purpose of the President to have the order promulgated and enforced in the ports and places in the Philippines when and as occupied or possessed by the forces of the United States. The language is not susceptible of any other construction. That course was not only the usual one in emergencies of the kind the world over, but it was the reasonable course when we consider that our government was engaged in taking possession of ports and places in a distant part of the world, inhabited by a strange mixture of people, many of them owing fealty to other nations. To such people public proclamation would be of great force and effect, and it was apparent, therefore, that it should be made before obedience ought to be required.

A parallel in principle is found in a "notified blockade," which is a notification accompanied by the fact of blockade. Wharton's Int. Law (3rd ed.), secs. 511, 519; Hall's Int. Law (4th ed.), secs. 257, 258.

This now well established doctrine of occupation and possession was clearly recognized and enforced during our Civil War as occasion offered. The Act of July 13, 1861 (12 Stat. 255, sec. 5), authorized the President to declare the inhabitants of a State, or any section or part thereof, where the insurrection existed, to be in a state of insurrection against the United States, and thereupon all commercial intercourse by and with its citizens should cease and be unlawful so long as hostilities existed. President Lincoln, August 16, 1862 (12 Stat. 1262), issued a proclamation on the subject, but excepted therefrom the inhabitants of such States "as may maintain a legal adhesion to the Union and to the Constitution, or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of the said insurgents." The statute and the excepting clause of the proclamation were considered by the Supreme Court in *The Venice*, 2 Wall., 259, 265, 270, and the court said that "Military occupation and control, to work this exception, must be actual; that is to say, not illusory, not imperfect, not transient; but substantial, complete, and permanent." That case was approved in *The Reform*, 3 Wall., 617, 632; *The Grapeshot*, 9 Wall., 129, 131; Levy *v.* Stewart, 11 Wall., 244, 253.

The Ratification Act of June 30, 1906, should not be so construed as

to violate the law of nations, if any other possible construction remains. International law is a part of our law, and must be ascertained and administered by the courts of justice as often as questions of right depending upon it are duly presented for their determination. Hilton *v.* Guyot, 159 U. S., 113, 163; *The Paquete Habana*, 175 U. S., 677, 700. "It has also been observed," said Mr. Chief Justice Marshall, in Murray *v.* Schooner Charming Betsy, 2 Cranch, 64, 118, "that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. These principles are believed to be correct and they ought to be kept in view in construing the act now under consideration."

When the Ratification Act was passed, Congress could not have been disregardful of the Hague Convention. The language of Mr. Justice Harlan in Chew Heong *v.* United States, 112 U. S., 536, 590, seems to be particularly applicable. "When the Act of 1882 was passed," said that learned justice, "Congress was aware of the obligation this government had recently assumed, by solemn treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the treaty, and without so declaring in unmistakable terms, to withdraw that privilege by the general words of the first and second sections of that act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer." This utterance of that great judge and patriot are commended to those of our citizens whose interests impel them to endeavor to avoid or evade the treaty obligations of their government.

ANOTHER SANCTION FOR INTERNATIONAL OBLIGATIONS

Under the title of "Higher Nationality: A study in law and ethics," Viscount Haldane, Lord Chancellor of Great Britain, delivered a notable address before the American Bar Association at Montreal on September 1, 1913. The public remarks of a Lord Chancellor of Great Britain are always, on account of the important office he holds, entitled to more than passing notice. But the Lord Chancellor is ordinarily

quite circumscribed in his travels, because he is the Keeper of the Great Seal, an instrument which he must neither quit without special authority nor carry out of the realm, and the audiences before which he may appear are necessarily limited to that extent. His must be more than a personal purpose, therefore, which would induce him to seek and obtain the permission of his sovereign to cross the seas in order to make an address at Montreal; and if the departure of the Lord Chancellor required the approval of the sovereign, it is not at all unlikely that what the Lord Chancellor was to say upon his arrival at his destination received also the approval of the sovereign, and perhaps of his ministers as well. Indeed, in the course of his remarks the Lord Chancellor delivered a personal message of esteem and good will from the King of Great Britain to the people of the United States and of Canada, and he expressly stated that the King's message formed the text for what he had to say.

Following the example of another distinguished Englishman, Lord Russell of Killowen, Chief Justice of England, who, in 1896, addressed the same association at Saratoga, New York, on the subject of international law and arbitration, the Lord Chancellor chose as his subject a question of international interest, namely, a suggestion of a sanction for international obligations which he thought had not previously attracted attention in connection with international law.

To develop his idea, the speaker began by recurring to the system of rules by which the daily conduct of the citizens of a state is regulated. "Of this system," he said, "the law forms only a small part," for "law, properly so called, whether civil or criminal, means essentially those rules of conduct which are expressly and publicly laid down by the sovereign will of the state, and are enforced by the sanction of compulsion." Besides the rules and sanctions of law, there were also, he said, the rules of morality. "But the tribunal of conscience is a private one, and its jurisdiction is limited to the individual whose conscience it is. The moral rules enjoined by the private conscience may be the very highest of all. But they are enforced only by an inward and private tribunal. Their sanction is subjective and not binding in the same way on all men."

"The field of daily conduct," he continued, "is covered, in the case of the citizen, only to a small extent by law and legality on the one hand, and by the dictates of the individual conscience on the other. There is a more extensive system of guidance which regulates conduct and

which differs from both in its character and sanction. It applies, like law, to all the members of a society alike, without distinction of persons. It resembles the morality of conscience in that it is enforced by no legal compulsion. In the English language we have no name for it. * * * German writers have, however, marked out the system to which I refer and have given it the name of 'Sittlichkeit.' * * * 'Sittlichkeit' is the system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations of the citizen which it is 'bad form' or 'not the thing' to disregard. Indeed regard for these obligations is frequently enjoined merely by the social penalty of being 'cut' or looked on askance. And yet the system is so generally accepted and is held in so high regard, that no one can venture to disregard it without in some way suffering at the hands of his neighbors for so doing. If a man maltreats his wife and children, or habitually jostles his fellow-citizens in the street, or does things flagrantly selfish or in bad taste, he is pretty sure to find himself in a minority and the worse off in the end. But not only does it not pay to do these things, but the decent man does not wish to do them. A feeling analogous to what arises from the dictates of his more private and individual conscience restrains him. He finds himself so restrained in the ordinary affairs of daily life. But he is guided in his conduct by no mere inward feeling, as in the case of conscience. Conscience, and for that matter, law overlap parts of the sphere of social obligation about which I am speaking. A rule of conduct may, indeed, appear in more than one sphere, and may consequently have a twofold sanction. But the guide to which the citizen mostly looks is just the standard recognized by the community, a community made up mainly of those fellow-citizens whose good opinion he respects and desires to have. He has everywhere round him an object-lesson in the conduct of decent people towards each other and towards the community to which they belong. Without such conduct and the restraints which it imposes there could be no tolerable social life, and real freedom from interference would not be enjoyed. It is the instinctive sense of what to do and what not to do in daily life and behaviour that is the source of liberty and ease. And it is this instinctive sense of obligation that is the chief foundation of society. Its reality takes objective shape and displays itself in family life and in our other civic and social institutions. It is not limited to any one form, and it is capable of manifesting itself in new forms and of developing and changing old forms. Indeed, the civic community is more than a political

fabric. It includes all the social institutions in and by which the individual life is influenced—such as are the family, the school, the church, the legislature, and the executive. None of these can subsist in isolation from the rest; together they and other institutions of the kind form a single organic whole, the whole which is known as the Nation. The spirit and habit of life which this organic entirety inspires and compels are what, for my present purpose, I mean by 'Sittlichkeit.' 'Sitte' is the German for custom, and 'Sittlichkeit' implies custom and a habit of mind and action. It also implies a little more. Fichte [1] defines it in words which are worth quoting, and which I will put into English: 'What, to begin with,' he says, 'does *Sitte* signify, and in what sense do we use the word? It means for us, and means in every accurate reference we make to it, those principles of conduct which regulate people in their relations to each other, and which have become matter of habit and second nature at the stage of culture reached, and of which, therefore, we are not explicitly conscious. Principles, we call them, because we do not refer to the sort of conduct that is casual or is determined on casual grounds, but to the hidden and uniform ground of action which we assume to be present in the man whose action is not deflected and from which we can pretty certainly predict what he will do. Principles, we say, which have become a second nature and of which we are not explicitly conscious. We thus exclude all impulses and motives based on free individual choice, the inward aspect of *Sittlichkeit*, that is to say morality, and also the outward side, or law, alike. For what a man has first to reflect over and then freely to resolve is not for him a habit in conduct; and in so far as habit in conduct is associated with a particular age, it is regarded as the unconscious instrument of the Time Spirit.'

"The system of ethical habit in a community is of a dominating character, for the decision and influence of the whole community is embodied in that social habit. Because such conduct is systematic and covers the whole of the field of society, the individual will is closely related by it to the will and spirit of the community. And out of this relation arises the power of adequately controlling the conduct of the individual. If this power fails or becomes weak the community degenerates and may fall to pieces. Different nations excel in their 'Sittlichkeit' in different fashions. The spirit of the community and its ideals may vary greatly. There may be a low level of 'Sittlichkeit'; and we have the spectacle of

[1] *Grundzüge des Gegenwärtigen Zeitalters*, Werke, Band vii., p. 214.

nations which have even degenerated in this respect. It may possibly conflict with law and morality, as in the case of the duel. But when its level is high in a nation we admire the system, for we see it not only guiding a people and binding them together for national effort, but affording the greatest freedom of thought and action for those who in daily life habitually act in harmony with the General Will."

After citing several examples to illustrate his meaning and to distinguish what he called the General Will from a collection of individual wills, he said, "Thus we find within the single state the evidence of a sanction which is less than legal but more than merely moral, and which is sufficient, in the vast majority of the events of daily life, to secure observance of general standards of conduct without any question of resort to force." He then asked: "If this is so within a nation, can it be so as between nations? * * * Can nations form a group or community among themselves within which a habit of looking to common ideals may grow up sufficiently strong to develop a General Will, and to make the binding power of these ideals a reliable sanction for their obligations to each other?"

"There is," he said, "nothing in the real nature of nationality that precludes such a possibility;" but, referring to the prayer of Grotius in concluding his work on War and Peace that God may "write these lessons on the hearts of all those who have the affairs of Christendom in their hands," and give to them "a mind fitted to understand and to respect rights, human and divine, and lead them to recollect always that the ministration committed to them is no less than this, that they are the Governors of Man, a creature most dear to God," the Lord Chancellor concludes:

"The prayer of Grotius has not yet been fulfilled, nor do recent events point to the fulfilment being near. The world is probably a long way off from the abolition of armaments and the peril of war. For habits of mind which can be sufficiently strong with a single people can hardly be as strong between nations. There does not exist the same extent of common interest, of common purpose, and of common tradition. And yet the tendency, even as between nations that stand in no special relation to each other, to develop such a habit of mind is in our time becoming recognisable. There are signs that the best people in the best nations are ceasing to wish to live in a world of mere claims, and to proclaim on every occasion, 'Our country, right or wrong.' There is growing up a disposition to believe that it is good, not only for all men

but for all nations, to consider their neighbours' point of view as well as their own. There is apparent at least a tendency to seek for a higher standard of ideals in international relations. The barbarism which once looked to conquest and the waging of successful war as the main object of statesmanship, seems as though it were passing away. There have been established rules of International Law which already govern the conduct of war itself, and are generally observed as binding by all civilized people, with the result that the cruelties of war have been lessened. If practice falls short of theory, at least there is to-day little effective challenge of the broad principle that a nation has as regards its neighbours' duties as well as rights. It is this spirit that may develop as time goes on into a full international 'Sittlichkeit.' "

FOURTH ANNUAL MEETING OF THE AMERICAN SOCIETY FOR JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES

The society with the expressive but unpronounceable name, as Mr. Choate facetiously calls it, held its fourth annual meeting under his presidency at Washington, December 4–6, 1913. It was well-attended, the papers at the different sessions were of unusual excellence, and the addresses at the formal dinner, which closed the meeting, were so apt and instructive that they will be preserved and printed in the volume of Proceedings which the Society issues after each annual meeting.

The aim of the Society is stated in the name, which is in itself a manifesto and a program. It seeks to advance the cause of judicial settlement without questioning the right of nations to submit their disputes to arbitration, if they wish to do so. But the members of the Society advocate in season and out of season the creation of a permanent international court of justice, composed of professional judges who will, to use an expression of Mr. Root's, act under a sense of judicial responsibility, and to which court the nations may submit their disputes of a legal nature for judicial decision by the passionless and impartial application of principles of justice. Arbitration is the modern shibboleth: every dispute, no matter how great or how little, whether it be political or legal, must be referred to the single remedy of arbitration, and a belief in arbitration as a catch-all and a cure-all is popularly made the test of the man of peace as distinguished from the man of war. The Society takes no attitude on arbitration: many of its members doubtless believe in the efficacy of arbitral procedure, certainly none are op-

posed to it; but many believe that for certain kinds of disputes, based upon or involving principles of law, the judicial is superior to the arbitral remedy, which often seems to be but a continuation of diplomatic procedure in which arbiters chosen, but not controlled, by the parties are substituted for diplomatic agents appointed and controlled by the nations in controversy.

There are many peace societies at home and abroad ardently devoted to the cause of arbitration; there is but one society devoted solely and exclusively to the advancement of judicial settlement—a fact which lends a special interest to the activity and the proceedings of the Society. It was founded four years ago, on February 6, 1909; it has held four annual conferences, three of them at Washington; it issues a quarterly bulletin on some phase of judicial settlement, and scatters it broadcast in foreign countries as well as in the United States. It is not a popular society in the sense that it has a waiting-list, but it has more than a thousand members and it has influenced leaders of opinion both at home and abroad. A single instance of this may be cited: the writer of this comment happened to visit a distinguished Lord Justice of England and found a volume of the annual Proceedings of the Society lying on his lordship's table. In reply to a question, his lordship stated that he was profoundly interested in the judicial settlement of international disputes and that he found more interesting information on this subject in these Proceedings than in any volume with which he was acquainted, and that he always carried a volume of the Proceedings with him to read in the car or in the hotel when away from home.

The fourth meeting of the Society was devoted exclusively to the question of an international court of justice, and it was peculiarly fortunate in its speakers. In the first place, Mr. Joseph H. Choate, President of the Society, presided at the opening session and delivered an address full of ripe wisdom and kindly wit, advocating the reference of the Panama toll dispute to an international tribunal, as it is preëminently a legal question, and advocating likewise steps to be taken to secure the call of a Third Hague Conference to meet in 1915, in accordance with the recommendation of the Second Conference, at which Mr. Choate so worthily represented the United States and procured the adoption of the recommendation for the Third Conference.

At the dinner Dr. David Jayne Hill, likewise a delegate of the United States to the Second Conference, made a singularly felicitous address in which he tacitly admitted the authorship of the instructions to the

American delegation to the First Conference, during which time he was Assistant Secretary of State, and related an interesting conversation with Sir Julian Pauncefote, then British Ambassador, in which the latter stated that the arrest of armament was impossible and that the Conference was doomed to failure unless other subjects of international interest were considered. Sir Julian informed Dr. Hill that he intended, with the approval of his government, to propose the establishment of an international court of arbitration. This he did, and, through his efforts, ably seconded by the American delegation, the present so-called Permanent Court of Arbitration was created by the First Conference.

The first session of the Society had an international aspect, due to the fact that two distinguished lawyers of Canada attended and spoke: Mr. Justice Riddell, the first Canadian member of the Society, on the possibilities of judicial settlement as shown by the practice of nations; Mr. Robert C. Smith, K. C., of Montreal, on the need and advantages of an international court of justice. Different phases of this question were discussed in papers by Mr. James D. Andrews and Mr. Edwin M. Borchard, Assistant Solicitor of the Department of State, who advocated the establishment of a court for contract claims of individuals against foreign governments. Mr. Joseph R. Wheless of St. Louis pleaded for a Pan American court of justice and Professor William I. Hull spoke on the Monroe Doctrine and the international court.

The second session was devoted to the discussion of the composition of the proposed court and proceedings before it. Thus, Dr. James L. Tryon gave a general survey of proposals to establish an international court; Mr. Otto Schoenrich, President of the Nicaraguan Claims Commission, discussed "The constitution of a permanent international court of justice." Mr. George T. Porter of Washington, D. C., and Mr. Denys P. Myers, examined the important problems contained in the following question: "In composition of the court, should the following elements be considered: (a) population of states; (b) commercial importance; (c) different systems of jurisprudence; (d) languages; (e) geographical situation?" Mr. Porter forsook the beaten track, presenting a series of original views and suggestions in a paper of literary charm and feeling. Mr. Walter S. Penfield, of the Washington Bar, read an interesting and instructive paper on the manner in which the jurisdiction of the proposed court should be defined, and Mr. Ralston, who has had great practical experience in arbitration as agent of the United States in the Pious Fund case, the first to be tried before the Permanent Court of

Arbitration, and as umpire in the Venezuela Commissions of 1903, described the methods of referring cases to the court and the methods of the trial of cases before the court.

At the third session, the Honorable Simeon E. Baldwin, Governor of Connecticut, read a thoughtful and convincing paper on the foundations of the international court of justice. This session, presided over by Governor Baldwin, was devoted to a consideration of the various kinds of peaceable settlement, showing the field covered by each and the use which could properly and advantageously be made of each remedy. Mr. George A. King, of Washington, discussed direct diplomatic settlement between parties in controversy. Dr. Charles Noble Gregory, Dean of the George Washington Law School, spoke on good offices and mediation; Mr. Arthur D. Call on friendly composition—a remedy too little practiced, though well known. The paper of Mr. Chandler P. Anderson, former Counsellor for the Department of State, on commissions of inquiry, was read by title but will be printed in the Proceedings. The Honorable Hannis Taylor, of Washington, and Mr. W. H. Short, of New York, spoke on arbitration. Professor George H. Blakeslee was unfortunately absent, but his paper on the limitations of arbitration will be printed in the Proceedings. The Honorable Philip Brown, formerly American Minister to Honduras, read a clear-cut paper on the limitations of arbitration, dwelling with particular force on the limitations and narrowing the field in favor of diplomacy.

It is believed that these papers give a valuable survey of the field covered by each of the remedies included in the program of the session, and that the printed volume containing them will be of service to students as well as of interest to the general reader.

The fourth and last session discussed the sanctions of international judgments, with the exception of Mr. Edward A. Harriman's admirable paper on codification of international law as an aid to international tribunals. This address, admirable and convincing, clear and faultless in expression, more properly belonged to the first session, which, however, Mr. Harriman was unable to attend.

The papers of Mr. Horace G. Macfarland, of the Washington Bar, on forcible execution, security in advance or seizure of property subsequent to award, and commercial pressure; of Honorable William Dudley Foulke, of Richmond, Indiana, and of Professor John K. Lord on public opinion, were models of scholarly thought and expression, and an experienced public speaker said after this session that he had never heard

four successive papers of such uniform excellence on any occasion.

It is believed that the Proceedings of the Fourth Annual Meeting will go far to justify the existence of the Society, and the volume will be no mean contribution to the cause of judicial settlement. A society which can boast four such presidents in succession as John Hays Hammond, Simeon E. Baldwin, Joseph H. Choate, and Charles W. Eliot (President for 1914), must have a mission, and their sustained interest in the Society and its proceedings can only mean that it is performing acceptably its mission.

SENATOR ROOT AND THE NOBEL PEACE PRIZE

In December last, the committee of the Swedish Storthing announced the award of the Nobel peace prize for 1912 to Senator Elihu Root, the President of the American Society of International Law. This splendid prize, established by Alfred B. Nobel, the Swedish scientist, at his death in 1898, is yearly distributed in five equal parts to persons who are adjudged to have contributed most to "the good of humanity" in physics, chemistry, medicine, literature, and in the promotion of the cause of international peace. Once before this peace prize has come to an American citizen; it was awarded to President Roosevelt in 1906, in recognition of his services in bringing to an end the Russo-Japanese war. Now it is bestowed upon the premier of Mr. Roosevelt's cabinet, and the President of the Carnegie Endowment for International Peace. Undoubtedly this award is a recognition of the services this illustrious American publicist has rendered the cause of international peace by his remarkable record in promoting the settlement of differences between nations by arbitration or by judicial methods.

For Mr. Root is not a pacifist in the ordinary sense of the word, but a believer in international peace brought about between nations by the same slow and gradual processes which have secured peace within national lines. Indeed, it may be said that Mr. Root is not so much in favor of peace as in favor of justice. His policy as Secretary of State and his views as a private citizen were clearly expressed in the address he delivered on May 11, 1908, in laying the cornerstone of the building of the Pan-American Union, quoted by the Minister of Foreign Affairs of The Netherlands at the opening of the Peace Palace at The Hague, in August last:

> There are no international controversies so serious that they cannot be settled peaceably if both parties really desire peaceable settlement, while there are few causes of disputes so trifling that they cannot be made the occasion of war if either party really desires war. The matters in dispute between nations are nothing; the spirit which deals with them is everything.

This was the spirit in which Mr. Root approached and settled the outstanding controversies to which the United States was a party when he was Secretary of State. His experience as a member of the Alaskan Tribunal taught him how difficult it is to settle controversies between nations which, by delay or mismanagement, have assumed political importance, and how easy it is to reconcile such controversies in time of profound friendship and peace. He entered upon the performance of his duties as Secretary of State with the avowed purpose either of actually settling all outstanding disputes between Great Britain and the United States, or of providing means for their peaceable settlement. Feeling that the Newfoundland question, which had embittered the foreign relations of Great Britain and the United States for years, would arise during his administration as Secretary of State, he visited the fishing grounds of Newfoundland and Labrador to study the question on the spot; took advantage of the first occasion to bring the entire question to discussion; and by great tact, forbearance, and a spirit of conciliation, brought about the arbitration of the entire question. He had the great satisfaction of participating in the settlement as leading counsel of the United States before the Tribunal at The Hague, to which the question was referred in 1910.

As Secretary of State, Mr. Root drafted the instructions to the American delegation to the Second Hague Conference, and urged upon them the negotiation of a general treaty of arbitration and the establishment of a truly permanent court of justice, composed of judges who would act under a sense of judicial responsibility. Recognizing the great service which a series of international conferences would render to the cause of international law and therefore to the cause of peace, he directed the American delegates to propose that the Conference should meet at regular intervals without awaiting any new and specific initiative on the part of the Powers, or any of them. The Conference failed, as is well known, to adopt a general treaty of arbitration; but Mr. Root manifested his belief in arbitration and its beneficent influence by negotiating within the course of a year and a half twenty-six arbitration treaties, all of which were ratified by the Senate. The Permanent Court of Jus-

tice which he advocated was adopted in principle by the Conference, but awaits the appointment of the judges through diplomatic channels. His proposal that the Conference should meet at regular intervals was also accepted in principle, but unfortunately the precise year in which the Third Conference shall meet was not fixed, with the result that the meeting of a Third Conference now depends not upon the arrival of a previously determined date, but upon negotiation and the pleasure of the Powers.

Mr. Root has frequently said that it is unbecoming the dignity of a nation to refuse to arbitrate a question which another country wishes to arbitrate, even though such question may have been passed upon by the national authorities. He applied this principle under very trying circumstances to the Panama Canal Act, insisting that as we had agreed by the arbitration treaty of 1908 to arbitrate questions arising as to the meaning of existing treaties, it is the duty of the United States to arbitrate the Panama toll controversy under the existing treaty of 1901. The settlement of the difference between Japan and the United States regarding the immigration of Japanese laborers to our Pacific coast was in accordance with the principle proclaimed in his speech in laying the cornerstone of the Pan American Union; for by this settlement the United States does not forbid Japanese laborers from coming to the United States, but enforces regulations made by the Japanese Government to prevent the emigration of Japanese laborers,—a solution equally honorable and satisfactory to the *amour-propre* of both governments.

Mr. Root is a great believer in the possibilities of Latin American development, and is anxious to see those countries grow and prosper, because, as he says, the prosperity of any country is a benefit to other countries, and the prosperity of all is a benefit to each. To quote his own words, in a speech delivered at Rio de Janeiro:

> We wish for no victories but those of peace; for no territory except our own; for no sovereignty except the sovereignty over ourselves. We deem the independence and equal rights of the smallest and weakest member of the family of nations entitled to as much respect as those of the greatest empire, and we deem the observance of that respect the chief guaranty of the weak against the oppression of the strong. We neither claim nor desire any rights or privileges or powers that we do not freely concede to every American Republic. We wish to increase our prosperity, to expand our trade, to grow in wealth, in wisdom, and in spirit, but our conception of the true way to accomplish this is not to pull down others and profit by their ruin, but to help all friends to a common prosperity and a common growth, that we may all become greater and stronger together.

The First Hague Conference was composed of representatives from twenty-eight states, and Mexico was the only Latin American country represented. Mr. Root believed that an international conference could not be truly international, if Latin America were unrepresented; and he procured the invitation of the Latin American states to the conference, not only for the benefit to the conference which would result from their participation, but also for the advantages it would confer upon the Latin American states thus drawn into the international movement.

While these services constitute Mr. Root's genuine title to the respect of foreign publicists, he has no less claim to the gratitude and admiration of his own countrymen for the services he rendered them during the troubled period when he was Secretary of War. It is common knowledge that he drafted the so-called Platt amendment; that he prepared Cuba for self-government, and as Secretary of State withdrew the American troops from Cuba when the Cuban people had adopted their constitution, incorporating in it the Platt amendment, and were prepared to govern themselves as an independent nation. It is also common knowledge that Mr. Root drafted the organic act for the government of the Philippines, and instituted the civil government of the islands.

As Secretary of State, Mr. Root adopted the principle of President Lincoln that no question is settled until it is settled right, and laid down for his guidance the principle that we cannot ask from foreign governments what we ourselves would not receive or grant under like circumstances. Hence the great respect in which he is held by foreign governments and by foreign peoples. It was the announcement of the Nobel award that gave Mr. Bryce, recently British Ambassador to the United States, the opportunity to declare his opinion in a speech before the National Liberal Club in London, that Mr. Root was the greatest Secretary of State the United States ever had.

It is thus by reason of his services in the application of international law to world problems that Mr. Root has been adjudged worthy of the Nobel peace prize, and this fact makes the award peculiarly gratifying to his friends, both at home and abroad. The award is not only a tribute to American diplomacy but a recognition of the fact that the attainment of international peace is finally to come through the development and processes of international law.

The part Mr. Root has played in the founding and development of the American Society of International Law is well known to the readers of this JOURNAL; and his seven annual addresses as its president have

already taken rank among the classics of the subject. Mr. Root is a member of the Institute of International Law, to which the Nobel peace prize was awarded in 1904,—the first and only instance since the fund was established in which an institution has been thus recognized. The Nobel peace prize for the year 1911 was awarded to the distinguished founder of the Institute, the late Dr. T. M. C. Asser; and now again for the third time in thirteen years, the services of international law and the international lawyers to the great and growing cause of world peace, are fittingly recognized.

THE AWARD OF THE NOBEL PEACE PRIZE TO SENATOR HENRI LAFONTAINE

Henri LaFontaine, of Belgium, who has been awarded the Nobel peace prize for 1913, has devoted his life with complete consecration to the work of internationalism, and is identified with this movement in many of its phases. Allying himself when a young man with organized labor, he later became a socialist as well, and as the representative of the social democrats was elected a member of the Belgian Senate in 1895, of which body he still continues to be a member. Sir William Randal Cremer, with whom Senator LaFontaine was intimately associated and from whose example he drew much of his inspiration, is the only other representative of organized labor who has been recognized in the award of the Nobel prize.

In 1894, Senator LaFontaine became one of the founders of L'Université Nouvelle, at Brussels, in which he has since occupied the chair of international law. In 1897, he founded his famous "House of Documentation," where he proposes to file and index everything printed in the world. This institution was followed in 1910 by the organization of the Union of International Associations, the Central Office of which is now established in Brussels, in commodious quarters furnished by the government. Two world congresses of international associations have since been held under its auspices. They demonstrated the practicability and the advantage of a central organization for all international associations, scientific, literary, sociological,—of whatever character, through which their coöperation and close sympathy can be secured in all fields of internationalism.

Senator LaFontaine is one of the most active members of the Interparliamentary Union. He has been the president of the *Bureau Inter-*

nationale de la Paix at Berne since 1907, and secretary of the Belgian Society for Peace and Arbitration since 1889.

In all of these capacities his tireless pen is constantly adding to the literature of pacifism. The *Annuaire de la Vie Internationale* is his conception, and largely his work, as is also the new periodical, *La Vie Internationale*. His most important contributions to permanent literature are *The Code of International Arbitration; Documentary History of International Arbitration* (1794–1900) and *Bibliography of Peace and Arbitration*. The second of these works, published under the title *Pasicrisie Internationale*, is recognized as his most important contribution to literature, and as the standard authority on the subject. It is a history of what may be termed modern international arbitrations from 1794 to 1900. In this connection it will be recalled that the Treaty of November 19, 1794, between the United States and Great Britain, provided for the settlement of a number of outstanding questions by mixed commissions. Prior to this date, there had been no general resort to arbitration. The year 1794, therefore, has been selected by international lawyers as marking the beginning of modern international arbitration; and Mr. LaFontaine's work was prepared with a view to giving the texts of all *compromis* entered into between the nations of the world from that date to the year 1900. It is the most comprehensive work of this kind ever published, and is recognized as of the highest importance and authority to those interested in studying the development of international arbitration as a method of settlement of disputes between nations.

It is thus plain that the Nobel Committee of Award has bestowed the prize for 1913 upon one whose devotion to the cause of internationalism has been proven by life-long service and by contributions whose value the world has long recognized.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Vie Int.*, La Vie Internationale, Brussels; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletin, bulletin, bolletino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletin de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain, Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, Journal; *J. O.*, Journal Officiel, Paris; *L'Int. Sc.*, L'Internationalism Scientifique, The Hague; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *Martens*, Nouveau recueil générale de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

January, 1912.

10–23 AUSTRIA-HUNGARY—SERVIA. Exchange of ratifications of treaty of extradition signed March 17/30, 1911. French and German texts: *Oesterreichisches Gesetzblatt*, 1912, No. 6; *Martens*, 7:595.

10–23 AUSTRIA-HUNGARY—SERVIA. Ratifications exchanged of a consular convention signed March 17/30, 1911. French and German texts: *Oesterreichisches Gesetzblatt*, 1912, No. 6; *Martens*, 7:564.

February, 1912.

10 FRANCE—ITALY. Ratifications exchanged of an arrangement concerning the protection of young workmen, signed June 15, 1911. Italian text: *Ga. Ufficiale*, 1912, No. 53; French text: *Martens*, 7:528.

29–June 19. BULGARIA—SERVIA. Secret treaty of alliance and secret annex signed at Sofia, Feb. 29, 1912. The additional convention agreeing to submit differences to the arbitration of Russia, and a military convention was signed June 19, 1912. This treaty was an agreement as to the conduct of the first Balkan campaign.

February, 1912.

Bulgaria and Greece signed a treaty of alliance May 16, and a military convention on Sept. 22, 1912. By the Treaty of London, which concluded this campaign, nearly the whole of Servia's share of the spoils was made into the state of Albania. Bulgaria insisted upon a strict compliance with the terms of the secret treaty and upon Servia's refusal the second Balkan campaign was instituted. The Treaty of Bucarest closed the second campaign, and gave to Servia a greater share than the secret treaty of Sofia. The Treaty of London was signed May 30, 1913, between Turkey and the Allies; the Treaty of Bucarest Aug. 10, 1913, between Bulgaria and Servia, Greece, Montenegro and Roumania; the Treaty of Constantinople, Sept. 29, 1913, between Bulgaria and Turkey; the Treaty of Belgrade, November 4, 1913, between Montenegro and Servia; the Treaty of Athens, Nov. 11, 1913, between Greece and Turkey.

April, 1912.

26 UNITED STATES. The Senate advised and consented to the ratification of the Declaration of London, signed at London, Feb. 26, 1909. *An. de l'Union Interparlementaire*, 1913:231; *United States Senate, 61st Cong. 1st sess. Confidential, Ex A.*

May, 1912.

16 BULGARIA—GREECE. Treaty of defensive alliance, with additional declaration signed. French text: *Mém. dipl., 51*:617; *Q. dipl. 36*:744.

24–Nov. 30 BAVARIA—PRUSSIA—WURTTEMBURG—BADEN. A treaty relating to state lotteries was signed by these countries July 29, 1911. Ratifications were exchanged between Wurttemburg and Prussia, May 24, 1912, between Prussia and Baden, May 20, and between Prussia and Bavaria, Nov. 30, 1912. German text: *Preussische Gesetzsammlung*, 1912:128; *Martens, 7*:493.

June, 1912.

7 BELGIUM—GERMANY. Exchange of notes approving convention signed June 25, 1911, relating to boundary between Belgian Congo and German East Africa. French and German texts: *Deutsches Kolonialblatt*, 1912, No. 14; *Martens, 7*:372.

June, 1912.

19 BULGARIA—SERVIA. Military convention signed, in conformity with the treaty of defensive alliance signed Feb. 29, 1912. French text: *Q. dipl.*, *36*:691; English text: Supplement to this JOURNAL, pp. 1, 3, 5, 10.

August, 1912.

7 GREAT BRITAIN—UNITED STATES—RUSSIA—JAPAN. Law promulgated by Great Britain carrying into effect the agreement relating to fur seals, signed July 7, 1911. Great Britain, *Seal Fisheries Act (North Pacific)*, 1912; English text: *Martens*, *7*:718.

September, 1912.

22 BULGARIA—GREECE. Military convention signed completing alliance of May 16, 1912. French text: *Mém. dipl.*, *51*:617.

October, 1912.

12 FRANCE—GERMANY. Declaration signed relating to civil procedure, in accordance with the Hague convention of July 17, 1905. French text: *R. de dr. int. privé et de dr. pénal int.*, *9*:673.

November, 1912.

20 BULGARIA—TURKEY. *Protocole armistice* of Tchatalda. French text: *Arch. dipl.*, *125*:84.

December, 1912.

20 SWEDEN. Decree concerning the admission of foreigners on board war ships. *Svensk Författnings-Samlung*, 1912, No. 401, 402; Swedish text: *Martens*, *7*:414.

January, 1913.

24 CUBA—VENEZUELA. Ratifications exchanged of the extradition treaty signed July 14, 1910. Spanish text: *Martens*, *7*:352.

February, 1913.

22 AUSTRIA-HUNGARY. Ordinance announcing the abolition of consular jurisdiction in Tripoli. *Oesterreichisches Reichsgesetzblatt*, 1913, No. 18; French text: *Martens*, *7*:345.

23 FRANCE—SPAIN. Tribunal met to settle Moroccan questions still pending. Tribunal consists of M. Léone for Spain, and M. A.

February, 1913.

Fabre, for France. In case of disagreement the King of England is to appoint a *sur-arbitre*. *La paix par le droit*, 1913:154.

March, 1913.

28 FRANCE. French decree putting into operation the INDUSTRIAL PROPERTY CONVENTION signed at Washington, June 2, 1911. *R. de dr. int. privé et de dr. pénal int.*, *9*:698.

31 NORWAY—SWEDEN. Convention relating to the right of Laplanders to pasturage for their reindeer. French text: *An. de l'Union Interparlementaire*, 1913:211.

May, 1913.

3 PANAMA—SPAIN. Ratifications exchanged of arbitration treaty signed July 25, 1912. French text: *Martens*, *7*:345; Spanish text: *Ga. de Madrid*, 1913:659.

5 COLOMBIA—MEXICO. Colombia recognized the Huerta Government in Mexico. *B. Rel. Ext.* (Mexico), *36*:152.

10 DOMINICAN REPUBLIC—GERMANY. Parcel post convention signed. Spanish text: *B. Rel. Ext.* (Dominican Republic), *1*:564.

24 HONDURAS—MEXICO. Honduras recognized the Huerta Government in Mexico. *B. Rel. Ext.* (Mexico), *36*:150.

29 ITALY—MEXICO. Italy recognized the Huerta Government in Mexico. *B. Rel. Ext.* (Mexico), *36*:154.

June, 1913.

6 PERMANENT COURT OF ARBITRATION AT THE HAGUE. The Government of Chile has appointed Señor Heliodoro Yañez, member of the Court from Chile, in place of the late Señor José Antolio Candrillas. Señor Yañez is a lawyer, Senator and Minister for Foreign Relations of Chile. *B. Rel. Ext.* (Mexico), *36*:171.

7 PERMANENT COURT OF ARBITRATION AT THE HAGUE. The Government of the Dominican Republic has appointed Señor Apolinar Tejera, member of the Court from the Dominican Republic, in place of Señor José Lamarche. Señor Tejera is the Secretary of the Department of Justice and Public Instruction of the Dominican Republic. *B. Rel. Ext.* (Mexico), *36*:172.

9 MEXICO—NORWAY. Norway recognized the Huerta Government in Mexico. *B. Rel. Ext.* (Mexico), *36*:153.

June, 1913.

9 ECUADOR—MEXICO. Ecuador recognized the Huerta Government in Mexico. *B. Rel. Ext.* (Mexico), *36*:155.

12 JAPAN—MEXICO. Japan recognized the Huerta Government in Mexico. *B. Rel. Ext.* (Mexico), *36*:156.

15–July 23. SECOND INTERNATIONAL CONFERENCE RELATING TO BILLS OF EXCHANGE MET AT THE HAGUE. The first conference met at The Hague in 1910. The following nations sent delegates to the second conference: Argentine Republic, Austria-Hungary, Belgium, Brazil, Bulgaria, Chile, China, Costa Rica, Denmark, Ecuador, France, Germany, Great Britain, Greece, Guatemala, Italy, Japan, Luxemburg, Mexico, Montenegro, Netherlands, Nicaragua, Norway, Panama, Paraguay, Portugal, Roumania, Russia, Servia, Siam, Sweden, Switzerland, Turkey and the United States.

The convention and resolutions were signed by the 26 states following: Argentine Republic, Austria-Hungary, Belgium, Brazil, Bolivia, Bulgaria, Chile, Denmark, France, Germany, Guatemala, Italy, Luxemburg, Mexico, Montenegro, Netherlands, Nicaragua, Norway, Panama, Paraguay, Russia, Salvador, Servia, Switzerland and Turkey. French text: *An. de l'Union Interparlementaire*, 1913:237; *R. de dr. int. privé et de dr. int. pénal*, *9*: 628, English and French texts: *United States Senate, 63d Cong., 1st sess., Doc.* 162.

17 ITALY—JAPAN. Exchange of ratifications of treaty of commerce and navigation signed Nov. 25, 1912. Italian decree promulgating treaty June 19, 1913. French text: *R. di dir. int.*, Vol. 2 (Série 2):431.

20 JAPAN—NETHERLANDS. Dutch decree carrying into effect the treaty of commerce and navigation signed July 6, 1912. French text: *Staats.*, 1913, No. 293.

July, 1913.

6 MEXICO—TURKEY. Turkey recognized the Huerta Government in Mexico. *B. Rel. Ext.* (Mexico), *36*:317.

7 NETHERLANDS. Dutch decree relating to international telegraphs. *Staats.*, 1913:323.

20 JAPAN—NETHERLANDS. Dutch decree carrying into effect the

July, 1913.

treaty of navigation signed July 6, 1912. French text: *Staatsb.*, 1913, No. 293.

21 DENMARK—MEXICO. Denmark recognized the Huerta Government in Mexico. *B. Rel. Ext.* (Mexico), *36*:319.

28 GERMANY—NETHERLANDS. Convention extending to the German Protectorate of Kiautchou the provisions of the extradition treaty of Sept. 21, 1897. Ratified and proclaimed by Germany Aug. 25, 1913. German and Dutch texts: *Reichs. G.*, 1913:704.

31 FRANCE—GREAT BRITAIN—SPAIN—PORTUGAL. A *compromis* was signed referring to the Permanent Court of Arbitration at The Hague the settlement of the differences between Portugal and France, Great Britain and Spain relating to property belonging to religious associations confiscated by the Republic of Portugal. The Tribunal will be composed of Dr. Van Savornin, Dutch Minister of State, and Dr. Lardy, Swiss Minister to France. Hon. Elihu Root will serve as Umpire. *London Daily Telegraph, Dec. 11, 1913.*

August, 1913.

8 HAITI—MEXICO. Haiti recognized the Huerta Government in Mexico. *B. Rel. Ext.* (Mexico), *36*:318.

8 FRANCE. French decree promulgating conventions signed April 4, May 23 and Oct. 28, 1912, between the Federal Railway Bureau of France and the Paris-Lyon-and-Mediterranean Railway for the use of the line from Geneva to La Plaine for the Paris-Lyon-and-Mediterranean railway trains and their entrance into the Geneva-Cornavin station. French texts: *J. O.*, 1913:7421.

10 BULGARIA—SERVIA, GREECE, MONTENEGRO and ROUMANIA. Treaty of peace ending the Second Balkan campaign. French text: *Q. dipl.*, *36*:240; English text: Supplement to this JOURNAL, p. 13.

11 BELGIUM—FRANCE. French decree promulgating a declaration signed July 18, 1900, modifying Article 10 of the extradition treaty between the two countries signed Aug. 15, 1874. *J. O.*, 1913:7397.

12 NETHERLANDS—RUSSIA. Dutch decree promulgating convention relating to associations and companies, signed Sept. 29, 1911, ratifications of which were exchanged July 18, 1913. French and Dutch texts: *Staats.*, 1913, No. 352.

August, 1913.

27 NETHERLANDS—NORWAY. Dutch decree proclaiming treaty of commerce and navigation signed May 20, 1912, ratified by Norway Aug. 22, 1913, and Netherlands Aug. 25, 1913. French and Dutch texts: *Staats.*, 1913, No. 362.

30 RED CROSS. French decree promulgating Geneva Convention of July 6, 1906.

September, 1913.

2 AUSTRIA—SWITZERLAND. Arbitration treaty signed, renewing the treaty of arbitration which expired Nov. 1, 1910. English summary: *Peace Movement, 2*:457; French summary: *Mouvement Pacifiste, 2*:449; German summary: *Friedens-Bewegung, 2*:470.

16 FRANCE—RUSSIA. French decree promulgating telephone convention signed April 19–June 27, 1912. French text: *J. O.*, 1913: 8797.

19 FRANCE—ITALY. French decree promulgating convention signed Jan. 18, 1908, ratifications of which were exchanged Aug. 5, 1913, relating to fisheries of Corsica and Sardinia. French text: *J. O.*, 1913:8465.

19 FRANCE—GREAT BRITAIN. French decree promulgating convention relating to telephone communication between the two countries, signed Feb. 5, 1912. French text: *J. O.*, 1913:7510, 8462.

21 DOMINICAN REPUBLIC. Declaration of blockade of ports of Puerto Plata, Sanchez and Samana. *J. O.*, 1913:8373.

24 FRANCE—LUXEMBURG. French decree promulgating telephone communication convention signed April 7, 1912. *J. O.*, 1913:8773.

29 BULGARIA—TURKEY. Treaty relating to adjustment of frontiers, signed at Constantinople. French text: *Q. dipl., 36*:494; *Times*, Sept. 18, Sept. 30, 1913; English text; SUPPLEMENT to this JOURNAL, p. 27.

October, 1913.

1–6 INTERNATIONAL LAW ASSOCIATION. The 28th meeting of the International Law Association was held in Madrid, October 1 to 6. *Peace Movement, 2*:454; *Mouvement Pacifiste, 2*:443; *Friedens-Bewegung, 2*:464; *Law Magazine & R., 39*:69.

9 GERMANY—SWITZERLAND—ITALY. St. Gotthard Railway Convention, signed Oct. 13, 1909, proclaimed by Germany. French and German texts: *Reichs. G.*, 1913:719; this JOURNAL, 7:601.

October, 1913.

13 TIBET. The conference on Tibet met at Simla, India. Sir Arthur McMahon is president. It appears that the Tibetans demand recognition by China of the autonomy of Tibet, the stipulation that henceforth no Chinese officials shall be stationed in Tibet, and the payment of indemnities to Tibet for damages by Chinese troops to property. *Times*, Oct. 14, 22, 1913.

14 FRANCE—GREAT BRITAIN. By an exchange of notes the arbitration convention signed Oct. 13, 1903, and renewed for five years on Oct. 14, 1908, was renewed for a further period of five years. *J. O.*, 1913:9757; *Great Britain, Treaty Series*, Nov. 18, 1913.

14 FRANCE—TURKEY. Accord signed for settlement of French claims against Turkey. French text: *Q. dipl.*, *36*:682; *Mém. dipl.*, *51*:547.

15 FRANCE—HAITI. French decree promulgating agreement signed Sept. 10, 1913, relating to settlement of claims against Haiti. French text: *J. O.*, 1913:9251; this JOURNAL, *7*:865, Sept. 10.

22 TURKEY. A commission was appointed consisting of Turks and foreigners to examine into the modifications necessary in the capitulations. *Mém. dipl.*, *51*:562.

25 BALKAN WAR. Third Campaign. Servian troops were withdrawn from Albania to the Serbo-Bulgarian frontier laid down by the Treaty of London. This withdrawal is accredited to the ultimatum recently served on Servia by Austria. *Times*, Oct. 27, 1913.

25 FRANCE—GREECE. French decree promulgating convention for the protection of dramatic works signed April 22, 1912, ratifications of which were exchanged at Athens, Sept. 22, 1913. French text: *J. O.*, 1913:6590.

27 BELGIUM—FRANCE. French decree promulgating declaration concerning the transmission of judicial and extra-judicial acts in civil and commercial affairs, signed Oct. 10, 1912. French text: *Arch. dipl.*, *125*:76.

27 PERSIA—TURKEY. The British and Russian legations at Teheran presented a joint note to the Persian Government relating to the Turco-Persian Demarcation Commission, in which Persia is formally requested to invite the two Powers to send delegates to accompany the commission, and to give these delegates powers as arbitrators to effect a final settlement in the case of those districts

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still under dispute, particularly in reference to the Zohab oilfields. *Times,* Oct. 28, 1913.

27 RUSSIA—TURKEY. Agreement signed relating to the government of Armenia and definite railway concessions. The reform scheme for Armenia was previously agreed to by France and Germany and plans the division of Armenia into two provinces under international supervision. The projected municipal councils will be composed of Mussulman and Armenian representatives and many Turkish features will be retained. *Times,* Oct. 29, 1913.

November, 1913.

3 HONDURAS—UNITED STATES. Arbitration treaty signed embodying the peace plan of the Secretary of State of the United States. See this JOURNAL, *7*:863—SALVADOR—UNITED STATES.

4 MONTENEGRO—SERVIA. Treaty signed settling the frontier. This was one of the treaties agreed upon under the Treaty of London, May 30, 1913. Ratifications exchanged at Belgrade, Nov. 27, 1913. *Mém. dipl., 5*:578, 610.

5 CHINA—RUSSIA. Agreement signed relating to Mongolia. The autonomy of Outer Mongolia is recognized by China, and Russia agrees to refrain from colonization and military occupation, with the exception of consular guards. Outer Mongolia shall comprise those regions under the jurisdiction of the Chinese Governor at Urga, the Tartar General at Uliassutai, and the Chinese General at Kobdo, and the frontier is to be settled by further negotiations. *N. Y. Times,* Nov. 6, 1913; *Times,* Nov. 6, 1913; French text: *Q. dipl., 30*:759.

5 COLOMBIA—PANAMA. The Senate of Colombia by unanimous vote passed a resolution again declaring that Colombia's Isthmian rights are imprescriptible. At the same time the Senate protested against the causes preventing Colombia's defense of her rights and stated that she would view with satisfaction "anything modifying those causes and replacing them by acts of equity and justice." *N. Y. Times,* Nov. 6, 1913.

5 ALASKA—CANADA. Speech by Hon. Frank O. Smith, of Maryland, in the United States House of Representatives, on Joint Resolution (H. J. Res., 146, 63d Cong. 1st sess.), requesting the President to negotiate with the British and Canadian Governments

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regarding the transfer of southeastern Alaska to Canada by sale or exchange. *Cong. Record*, Nov. 7, 1913.

7 ECUADOR. It was announced that Ecuador had begun negotiations for a European loan of $30,000,000, which will be used for waterworks and sewerage systems in Guayaquil. The improvement of the sanitation of Guayaquil is made imperative by the early opening of the Panama Canal. *Washington Post*, Nov. 8, 1913.

9 CHINA—NETHERLANDS. Consular convention signed. *Mém. dipl.*, *51*:578.

10 BELGIUM—FRANCE. French decree promulgating a declaration signed at Brussels, July 18, 1900, for the revision of Art. 10 of the extradition treaty signed Aug. 15, 1874, the ratifications of which were exchanged Oct. 31, 1913. French text: *J. O.*, 1913:9966; *Monit.*, Nov. 6, 1913.

11–13 GREECE—TURKEY. Treaty signed at Athens settling differences growing out of the Balkan War. This was one of the treaties agreed upon at the conference of London. Ratified by Turkey and ratifications exchanged at Athens, Nov. 27, 1913. *Times*, Nov. 14, 28, 1913; *Mém. dipl.*, *51*:579, 582. French text: *Q. dipl.*, *36*:623, 682; English text: Supplement to this JOURNAL, p. 46.

14 INTERNATIONAL CONGRESS ON SAFETY AT SEA met at London.

15 UNITED STATES—URUGUAY. Arbitration convention signed Jan. 9, 1909; ratified by the United States March 9, 1909; ratified by Uruguay June 27, 1913; ratifications exchanged Nov. 14, 1913; proclaimed by the United States Nov. 15, 1913; English and Spanish texts: *U. S. Treaty Series*, No. 583.

18 COSTA RICA—PANAMA BOUNDARY ARBITRATION. In accordance with the requirements of the treaty of March 17, 1910, the Case of each Government was filed with the Arbitrator, Chief Justice White. The answers are required to be filed within six months thereafter. English text of treaty: Supplement, *6*:1.

23 BULGARIA—GREECE. The Bulgarian Minister for Foreign Affairs, M. Guenadieff, has proposed to the French Chargé d'affaires at Sofia that the differences between Bulgaria and Greece concerning prisoners of war be submitted to President Poincaré as arbitrator. Bulgaria agreed to accept the arbitration unreservedly. Bulgaria complains that Greece still holds and refuses to release Bulgarian prisoners of war. *N. Y. Herald*, Nov. 23, 1913.

December, 1913.

4 ALBANIA. It is announced that the great Powers of Europe have given their consent to the assumption of the throne of Albania by the Prince of Wied.

4 UNITED STATES. The Secretary of the Navy of the United States announced that he would favor an international Congress in Washington within the coming year to bring about a world-wide agreement for limiting the building of battleships. *N. Y. Times*, Dec. 5, 1913.

7 SWITZERLAND—UNITED STATES. Arbitration treaty signed renewing for a further period of five years the arbitration treaty which expired Feb. 29, 1913.

8 UNITED STATES. The House of Representatives passed, by a vote of 317 to 11, the following resolution: Resolved, That in the opinion of the House of Representatives the declaration of the First Lord of the Admiralty of Great Britain, the Right Hon. Winston Churchill, that the Government of the United Kingdom is willing and ready to co-operate with other Governments to secure for one year a suspension of naval construction programs offers the means of immediately lessening the enormous burdens of the people and avoiding the waste of investment in war material.

Sec. 2. That a copy of this resolution be furnished the President with the request that, so far as he can do so, having due regard for the interests of the United States, he use his influence to consummate the agreement suggested by the Right Hon. Winston Churchill. *United States House of Representatives, 53d Cong., 2d sess., House Res. 298; Congressional Record, Dec. 8, 1913.*

12 CHINA—RUSSIA. Russia proposed to the other Powers the evacuation of Tchi-Li by the international troops which have been stationed there since the Boxer Rebellion.

13 FIFTH PAN AMERICAN CONFERENCE. Announcement of the tentative program for the Fifth Pan American Conference at Santiago de Chile in 1914. All but the last three topics are said to be within the usual strict precautions taken to prevent the raising of embarrassing questions at Pan American Conferences. The eleventh topic proposed is:

"Declaration as a principle of American policy that aliens do not enjoy other civil rights or other resources than those guaran-

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teed by the constitution and laws of each country to the citizens thereof."

This tentative program has been submitted to the Pan American nations for approval. It is said to have already received the approval of the Secretary of State of the United States. The criticism of the eleventh topic is that such an agreement would curtail the right of one of the states to intervene diplomatically on behalf of its citizens in other Pan American states, thus leaving the alien no redress in case of a denial of justice or unfair treatment by the courts of the country of his domicile.

14 CRETE. Formal annexation of the Island of Crete to Greece. Crete was under Venetian rule from 1211 to 1669, when it was taken by Turkey and retained until the outbreak of the Greek revolution in 1830 being always considered one of the worst governed of Turkish provinces. When Greek independence was declared the Powers refused to include Crete among the islands annexed to Greece, but arranged its administration by the Viceroy of Egypt. In 1840 the government was again undertaken by Turkey. After an insurrection in 1868 a kind of constitution with a certain autonomy was granted, embodied in the Organic Act of 1868. In 1878, the Cretans invoked the mediation of England and a convention known as the Pact of Halepa was drawn up, which confirmed the Organic Act and inaugurated a parliamentary régime. The Pact was observed until 1889, when the Porte, during another insurrection, issued a firmin abolishing it, and, although the Pact possessed quasi-international sanction, its abolition did not cause the Powers to intervene. Another insurrection in 1896 forced the Porte to restore the Pact and grant a new constitution. The insurrection continued, and in 1897, when Greece intervened, an international fleet blockaded the Cretan coast. The Powers called upon Greece to evacuate the island, and refused to allow its annexation to Greece, but declared that owing to the failure of Turkey to carry out promised reforms, Crete should be given an autonomous government, under the suzerainty of Turkey, but paying no tribute. Cretan autonomy was proclaimed March 20, 1897. The Powers divided the island into four departments, which they severally undertook to administer. The government was directly under a High Commis-

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sioner, the post being occupied by Prince George of Greece from Nov. 28, 1898 to September 25, 1906. By an agreement dated August 14, 1906, the Powers invited the King of Greece, in event of the office of High Commissioner becoming vacant, to propose a candidate for the post to be nominated by the Powers for a period of five years, and agreed that Greek officers were to take over the direction of the gendarmerie and militia. In 1908 there was much agitation for annexation to Greece, the Cretans issuing an annexation proclamation, and the Powers declared the administration would be intrusted to the "constituted authorities" until the question could be settled with the consent of Turkey. In September, 1911 the Powers announced that they would not fill the post of High Commissioner, nor in any way change the *status quo* of the island, which left the government in the hands of a commission and assembly, acting in the name of the King of Greece. In October, 1912, the Cretan deputies were admitted to the Greek Parliament at Athens, the annexation proclamation of 1908 was sanctioned by Greece, and a governor was appointed. On February 15, 1913, the island was formally evacuated by the Powers, and on December 14, 1913, King Constantine of Greece personally raised the Hellenic flag over the Island. *Statesman's Yearbook*, 1913.

16 Death of Baron Carl Carlson Bonde. Baron Bonde was President of the Swedish arbitration group in the Swedish Chamber of Deputies, President of the Swedish Group of the Interparliamentary Union, First Gentleman of the Swedish Court and member of the Advisory Council of the Carnegie Endowment. He was the author of various historical works.

17 NICARAGUA—UNITED STATES. Arbitration treaty signed embodying the peace plan of the Secretary of State of the United States. See this JOURNAL, 7:863—SALVADOR—UNITED STATES.

18 NETHERLANDS—UNITED STATES. Arbitration treaty signed embodying the peace plan of the Secretary of State of the United States. See this JOURNAL: 7:863—SALVADOR—UNITED STATES.

23 CHINA—GERMANY. Agreement signed by Chinese Foreign office and German Minister to China, for the construction of two railways in China to be undertaken by German engineers with German capital. The estimated cost of the two railways is from

December, 1913.

$17,000,000 to $20,000,000. The first line is to run from Kaomi near Kiao-chou on the Shantung Railway southward to Hanchwang, where the Tien-Tsin-Pukow Railway crosses the Grand Canal. The second line is to extend the Shantung Railway from its present terminus at Tsinan to Shunteh, on the Hankow Railway. The concession for the Kaomi line was granted in the Kiao-chou treaty of 1898 but never before undertaken. *N. Y. Herald*, Dec. 24, 1913.

30 ITALY—PORTUGAL. Italy has accepted for the settlement of her claims against Portugal for confiscation of property belonging to Italian religious associations, the principle of arbitration agreed upon by Portugal with Great Britain, France and Spain.

INTERNATIONAL CONVENTIONS

Adhesions, Ratifications and Denunciations

AUTOMOBILES. Paris, October 11, 1909.

Adhesions:

Denmark for Danish Antilles, except Faroe Islands (R). Aug. 13, 1913. *J. O.*, 1913:7493.

Denunciations:

Great Britain for Barbados, Leeward Islands, Northern Nigeria, Southern Nigeria, Sierra Leone and Seychelles. Aug. 13, 1913. *R. gén. de dr. int. pub.*, *20*:605.

COLLISIONS AT SEA. Brussels, September 23, 1913.

Ratifications:

Greece. *J. O.*, 1913:9325.
Nicaragua. *Reichs-G.*, 1913:707.
Norway. *J. O.*, 1913:10482.

COPYRIGHT, LITERARY AND ARTISTIC PROPERTY. Berne, 1886; Paris, 1896; Berlin, 1908.

Adhesions:

Great Britain for Newfoundland, July 1, 1912.

DECLARATION OF LONDON. Feb. 26, 1909.

Declaration concerning the laws of naval warfare. Signed by Ger-

many, United States, Austria-Hungary, France, Great Britain, Netherlands, Spain, Italy, Russia and Japan.

Ratification advised by the United States Senate April 26, 1912.

Ratification voted down in the Parliament of Great Britain.

English text: *Malloy*, Vol. 3 (*Charles*), 266; *United States Senate, 61st Cong., 1st sess., Confidential, Ex A.*

INDUSTRIAL PROPERTY. Washington, June 2, 1911.

Convention of the union of Paris March 20, 1883, revised at Brussels, December 14, 1900, and at Washington June 2, 1911. Signed by Germany, Austria, Belgium, Brazil, Cuba, Denmark, Dominican Republic, Spain, United States, France, Great Britain, Italy, Japan, Mexico, Norway, Portugal, Servia, Sweden, Switzerland, France for Tunisia.

Ratifications, up to April 1, 1913:

Germany, Austria-Hungary, Dominican Republic, Spain, France, Great Britain, Italy, Japan, Mexico, Norway, Netherlands, Portugal, Switzerland and Tunis. Ratified by United States, June 20, 1912, proclaimed, April 29, 1913.

Adhesions:

Great Britain for New Zealand, Ceylon, Trinidad and Tobago. *R. gén. de dr. int. pub., 20*:509.

Great Britain for Papua, Feb. 1, 1913; Norfolk Island and Australia, July 1, 1912. *J. O.*, 1913:10482.

French and English texts: *U. S. Treaty Series*, No. 579; French text: *Arch. dipl., 126*:65; German text; *Reichs-G.*, 1913:236, 251.

PUBLIC HYGIENE. Rome, December 9, 1907.

Adhesions:

Uruguay. *J. O.*, 1913:8773.

French and English texts: *Malloy, Treaties, Conventions, etc.*, Vol. 2, 2214.

SALVAGE. Brussels, September 23, 1910.

Ratifications:

Greece. *J. O.*, 1913:9325.

Norway. *J. O.*, 1913:10482.

SANITARY CONVENTION. Paris, January 17, 1912.

Signed by Germany, United States, Argentine Republic, Austria, Belgium, Bolivia, Brazil, Bulgaria, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Spain, France, Great Britain, Greece, Guatemala, Haiti, Honduras, Italy, Luxemburg, Mexico, Montenegro, Norway, Panama, Netherlands, Persia, Portugal, Roumania, Russia, Salvador, Servia, Siam, Sweden, Switzerland, Turkey, Egypt, Uruguay.

Ratifications:

Uruguay.

United States: ratification advised by the Senate, Feb. 26, 1913.

French and English texts: *Malloy*, Vol. 3 (*Charles*), 390; Spanish text: *B. Rel. Ext.* (Colombia), *4*:435.

TRADE-MARKS. Madrid, April 14, 1891. Washington, June 2, 1911.

Signed by Brazil, Cuba, Spain, France, Great Britain, Portugal, Switzerland and Tunis.

Ratifications:

France. April 17, 1913.

Great Britain for Ceylon, Trinidad, Tobago. *R. gén. de dr. int. pub.*, *20*:605.

French text: *Arch dipl.*, *126*:80.

WHITE SLAVERY. Convention, Paris, May 4, 1910.

Accessions:

Great Britain for Canada, April 25, 1913; *R. gén. de dr. int. pub.*, *20*:605; *J. O.*, 1913:8773. Great Britain for South African Union, Sept. 19, 1913. *R. gén. de dr. int. pub.*, *20*: 605; *J. O.*, 1913:8773. Great Britain for Newfoundland and New Zealand, Oct. 1, 1913. *J. O.*, 1913:10151. Portugal, Sept. 9, 1913.

French text: *J. O.*, April 23, 1913; French and German texts: *Reichs-G.*, 1913:31.

KATHRYN SELLERS.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN [1]

Aliens Act, 1905. Return of alien passenger traffic to and from the United Kingdom, and number of expulsion orders made, during the three months ended June 30, 1913. *Cd.* 7047, 2d.

Aviation, Memorandum on naval and military. *Cd.* 6695. 1½d.

China. Further correspondence respecting the affairs of. (February to December, 1912.) *Cd.* 7054. 11½d.

East Africa Protectorate. Judgment, dated May 26, 1913, of the High Court in the case brought by the Masai Tribe against the Attorney-General of the East Africa Protectorate and others. *Cd.* 6939. 1½d.

Egypt. Translation of organic and electoral law, promulgated July 21, 1913. *Cd.* 6878. 3½d.

Marconi's Wireless Telegraph Co., Ltd., Agreement between, and the Postmaster General, with regard to the establishment of a chain of Imperial wireless stations; with Treasury minute thereon. *H. of C. Reports and Papers*, 1913, No. 217. 7½d.

Opium. Agreement between United Kingdom and Portugal for regulation of opium monopolies in the colonies of Hong Kong and Macao. Signed at London, June 14, 1913. *Treaty ser., 1913*, No. 11. 1d.

Persia. Financial advances made by H. M. Government and the Government of India to the Persian Government. *Cd.* 7053. 1d.

Sierra Leone. Despatch from the Governor, reporting on the measures adopted to deal with unlawful societies in the protectorate. *Cd.* 6961. 2½d.

UNITED STATES [2]

Alaska fisheries, Laws and regulations for protection of. 5 p. *Commerce Dept.* (Circular 251; Bureau of Fisheries.)

[1] Official publications of Great Britain and many of the British colonies may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

[2] When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Canal Zone, Executive order to punish deported persons who return to. Sept. 25, 1913. 1 p. f°. (No. 1832.) *State Dept.*

Extradition between Philippine Islands or Guam and British North Borneo. Arrangement effected by exchange of notes, signed Sept. 1–23, 1913. 4 p. *Treaty ser.*, No. 582. *State Dept.*

Indemnity. Report favoring H. 7384 to authorize payment of indemnity to Italian Government for killing of Angelo Albano. Oct. 2, 1913. 1 p. *S. rp.* 118.

International conference on safety at sea, preliminary work for. Report to Secretary of Commerce of committee on aids and perils to navigation. [1913] 13 p. *Commerce Dept.*

———. Report of committee on efficiency of officers and crews. [1913] 6 p. *Commerce Dept.*

———. Report of committee on radiotelegraphy. [1913] 6 p. *Commerce Dept.*

———. Report of committee on fire protection. [1913] 3 p. *Commerce Dept.*

———. Report of committee on hulls and bulkheads. [1913] 47 p. il. *Commerce Dept.*

———. Report of committee on lifeboats. [1913] 6 p. *Commerce Dept.*

International Cotton Congress, The Hague, June 9–11, 1913. Report by sub-committee to permanent American commission on agricultural finance, production, distribution, and rural life. 1913. 5 p. *S. doc.* 176. Paper, 5c.

International Institute of Agriculture, Rome, May, 1913. Report of delegates of United States to general assembly of, with annual report of permanent delegate. Sept. 29, 1913. 64 p. *S. doc.* 196. Paper, 5c.

International Joint Commission on Boundary Waters between United States and Canada. Decision and order of approval in matter of application of Watrous Island Boom Co. for approval of plans for boom in Rainy River. 89 p. map. *State Dept.* Paper, 10c.

International radiotelegraph convention. List of abbreviations to be used in radio communication. [1913] 1 p. il. f°. *Navigation Bureau.* (Radio service.) Paper, 5c.

Mexico. H. J. R. 130 for relief and transportation of destitute American citizens in. Sept. 16, 1913. (No. 8.)

Naturalization laws and regulations, Aug. 20, 1913. 33 p. Paper, 5c. *Naturalization Bureau.*

Panama Canal traffic and tolls. By Emory R. Johnson, special commissioner. Errata. [1913] 1 p. 4°. *War Dept.*

Panama-Pacific International Exposition, Report favoring H. 7595, for free importation of articles intended for foreign buildings and exhibits at. Sept. 2, 1913. 4 p. *H. rp.* 65.

Peace, world, under American leadership, sermon by T. M. C. Birmingham. Sept. 25, 1913. 18 p. *S. doc.* 139.

Porto Rico. Compilation of revised statutes and codes of Porto Rico, embracing certain Spanish laws still in force, general and permanent legislation Dec. 3, 1900–Mar. 9, 1911; with organic laws of Porto Rico, being treaty of peace with Spain and acts of Congress having special reference to Porto Rico. 1913. vii+1682 p. large 8°. *S. doc.* 813, *61st Cong. 3d sess.* Cloth, $3.25.

Radiotelegraph convention between United States and other Powers; signed London, July 5, 1912, proclaimed July 8, 1913. 76 p. il. *Treaty ser.*, No. 581. [French and English.] *State Dept.*

South America. The world race for rich South American trade, article relating to competition between United States, Germany, Great Britain, and Italy for rich South American trade, and survey of effects of Panama Canal upon South America. By Charles Lyon Chandler. 1913. 12 p. *S. doc.* 208. Paper, 5c.

Tariff. Response to resolution, report, with accompanying papers, relating to paragraph J, subdivision 7, of sec. 4, 5 as amended, of H. 3321, providing for discount of 5 per cent on duties on goods, wares, and merchandise imported by vessels admitted to registration under laws of United States. Sept. 4, 1913. 4 p. *S. doc.* 179.

Taxation of government property in capitals of leading countries of the world, Response to resolution, communication with information relating to. August 13, 1913. 64 p. *S. doc.* 163. Paper, 5c.

GEO. A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

WILLIAM STEWART MACLEOD V. THE UNITED STATES

Supreme Court of the United States

June 10, 1913

The appellant, William Stewart MacLeod, surviving partner of MacLeod & Company, brought suit in the Court of Claims to recover from the United States the amount of certain duties paid by the firm under protest upon a cargo of rice imported into the Island of Cebu at the city and port of the same name, in the Philippine Islands, on January 29, 1899. The Court of Claims decided in favor of the United States and rendered judgment dismissing the petition. 45 Ct. Cls. 339. The case was then appealed to this court.

The Court of Claims made findings of fact, the substance of which is as follows:

The claimant firm, comprised of the appellant (the survivor) and two others, all citizens of Great Britain, had its head office at Manila and was engaged in doing a general mercantile business there and elsewhere in the Orient. On January 13, 1899, the claimants chartered an American steamship, the *Venus*, at Manila and cleared her in ballast for Saigon, China, whence she sailed for the port of Cebu with a cargo of rice on January 22nd, carrying the usual consular papers. Prior to that time it had been the practice of the military authorities at Manila to require importers, residing in that city and shipping rice to points in the Philippines not actually occupied by the United States forces, to present certified manifests covering their cargoes and to pay the duties thereon to the United States military collector of customs at Manila, which practice was a matter of common knowledge and discussion among the business men in that city, but there is no other evidence charging the claimants with knowledge of the fact.

The collector at Manila was informed by competitors of the claimants that the latter proposed to ship the cargo to Cebu without paying duty

at Manila and that, as they complied with the requirements of the United States authorities, they would be unable to compete, under such unfair conditions, with the claimants; and the collector received confirmation of such report from the consul at Saigon on the 21st of January, and on the 23rd officially notified the claimants that a certified manifest must be presented and duties paid on the cargo at the custom house at Manila. The next day one of the claimants presented in person to the collector a letter stating that there had been no secret as to the movement of the *Venus;* that she had been openly dispatched to Saigon to load a cargo of rice for the Philippines, and that the captain had instructions to secure consular papers, if ordered to Cebu, in case that port should be in the possession of the United States authorities upon his arrival, and that they presumed his papers were in order; that according to their advice Cebu was in the hands of the republican government, whose authorities would exact the payment of duties, the same in amount as under the Manila tariff; that in selling the cargo they had been required to guarantee that the duties would not exceed those under the Manila tariff; that the claimants protested against paying the duties twice, as it was through no fault of theirs that the duties went to the Cebu authorities, and that, desiring to respect the notification, they would, if instructed, request their Cebu friends to protest against the payment in Cebu because, according to the notification, the Cebu customs were under the control of the United States. At the same time the collector was informed that a ship of the claimants was about to leave Manila for Cebu, which would arrive in time to head off the *Venus* (which did in fact sail from Manila that day and arrived in Cebu before the *Venus);* that their intention in so advising the collector was that he might take the steps he thought most expedient, but that the claimants, unless otherwise ordered by the United States, intended to carry out their contract with the purchasers of the cargo, even if required to pay double duties.

Upon the arrival of the *Venus* at Cebu, January 29, 1899, the native government demanded the payment of duties on the cargo and refused to allow its discharge until such payment was made. On February 4, 1899, the duties were paid and the cargo delivered to the purchasers. Upon the arrival of the *Venus* thereafter at Manila, with a cargo from Cebu, she was at first prevented from discharging her cargo without paying the duties involved in this case, but later was permitted to do so. Subsequently the collector refused to receive further business from the

claimants until the duties in question were paid, and because of such refusal and in order to transact further business with the collector, the claimants, involuntarily and under protest, paid the duties demanded.

War was declared with Spain on April 25, 1898, and on May 1, 1898, the forces of the United States captured Manila Bay and harbor. The following order of the President was thereafter promulgated:

> Executive Mansion, July 12, 1898.
>
> By virtue of the authority vested in me as Commander-in-Chief of the Army and Navy of the United States of America, I do hereby order and direct that upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States the following tariff of duties and taxes, to be levied and collected as a military contribution, and regulations for the administration thereof, shall take effect and be in force in the ports and places so occupied.
>
> Questions arising under said tariff and regulations shall be decided by the general in command of the United States forces in those islands.
>
> Necessary and authorized expenses for the administration of said tariff and regulations shall be paid from the collections thereunder.
>
> Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War.
>
> WILLIAM MCKINLEY.

The protocol of August 12, 1898, provided that "The United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines." Manila was opened as a port of entry on August 20, 1898, and Cebu on March 14, 1899. The executive order of July 12, 1898, was not proclaimed in Cebu until February 22, 1899, or later. The treaty of peace was signed on December 10, 1898, but ratifications were not exchanged until April 11, 1899. The Spanish forces evacuated the Island of Cebu on December 25, 1898, having first appointed a provisional governor. Shortly thereafter the native inhabitants, formerly in insurrection against Spain, took possession of the island, formed a so-called republic and administered the affairs of the island until possession was surrendered to the United States on February 22, 1899, prior to which time no authorities of the United States had been in the island and the United States had not been in possession or occupation of the island, it having been up to that time in the actual physical possession of the Spanish and the people of the island.

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the court.

When the Spanish fleet was destroyed at Manila, May 1, 1898, it became apparent that the Government of the United States might be required to take the necessary steps to make provision for the government and control of such part of the Philippines as might come into the military occupation of the forces of the United States. The right to thus occupy an enemy's country and temporarily provide for its government has been recognized by previous action of the executive authority and sanctioned by frequent decisions of this court. The local government being destroyed, the conqueror may set up its own authority and make rules and regulations for the conduct of temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation. Such was the course of the government with respect to the territory acquired by conquest and afterwards ceded by the Mexican Government to the United States. Cross *et al. v.* Harrison, 16 How. 164. See also in this connection Fleming *et al. v.* Page, 9 How. 603; New Orleans *v.* Steamship Co., 20 Wall. 387; Dooley *v.* United States, 182 U. S. 222; 7 Moore's International Law Digest, §§ 1143 *et seq.*, in which the history of this government's action following the Mexican War and during and after the Spanish-American War is fully set forth: and also Taylor on International Public Law, chapter IX, Military Occupation and Administration, §§ 568 *et seq.;* and II Oppenheim on International Law, §§ 166 *et seq.*

There has been considerable discussion in the cases and in works of authoritative writers upon the subject of what constitutes an occupation which will give the right to exercise governmental authority. Such occupation is not merely invasion, but is invasion plus possession of the enemy's country for the purpose of holding it temporarily at least. II Oppenheim, § 167. What should constitute military occupation was one of the matters before The Hague convention in 1899 respecting laws and customs of war on land, and the following articles were adopted by the nations giving adherence to that convention, among which is the United States (32 Stat. II, 1821):

Article XLII. Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation applies only to the territory where such authority is established, and in a position to assert itself.

Article XLIII. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish

and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

A reference to the Messages and Papers of the Presidents, to which we may refer as matters of public history, shows that the President was sensible of and disposed to conform the activities of our government to the principles of international law and practice. See 10 Messages and Papers of the Presidents, 208, executive order of the President to the Secretary of War, in which the President said (p. 210):

> While it is held to be the right of a conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contributions to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army.

To the same effect, executive order of the President to the Secretary of the Treasury, in which the President said (p. 211):

> I have determined to order that all ports or places in the Philippines which may be in the actual possession of our land and naval forces by conquest shall be opened, while our military occupation may continue, to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the rates of duty which may be in force at the time when the goods are imported.

And the like executive order of the President to the Secretary of the Navy (p. 212).

In pursuance of this policy, the order of July 12, 1898, was framed. By its plain terms the President orders and directs the collection of tariff duties at ports in the occupation and possession of the forces of the United States. More than this would not have been consistent with the principles of international law, nor with the practice of this government in like cases. While the subsequent order of December 21, 1898, made after the signing of the treaty of peace, is referred to in the brief of counsel for the government, it was not alluded to in the findings of fact of the Court of Claims; but we find nothing in that order indicating a change of policy in respect to the collection of duties. While the signing of the treaty of peace between the United States and Spain on Decem-

ber 10, 1898, was stated, the responsible obligations imposed upon the United States by reason thereof were recited and acknowledged and the necessity of extending the government with all possible dispatch to the whole of the ceded territory was emphasized, no disposition was shown to enlarge the number of ports and places in the Philippine Islands at which duties should be collected so as to include those not occupied by the United States, and the President said (p. 220):

> All ports and places in the Philippine Islands in the actual possession of the land and naval forces of the United States will be opened to the commerce of all friendly nations. All goods and wares not prohibited for military reasons, by due announcement of the military authority, will be admitted upon payment of such duties and other charges as shall be in force at the time of their importation.

The occupation by the United States of the city, bay and harbor of Manila pending the conclusion of a treaty which should determine the control, disposition and government of the Philippines was provided for by the protocol of August 12, 1898, and the necessity of further occupation, until the exchange of ratifications by the Governments of Spain and the United States, was recognized by the President in the order of December 21, 1898. We have been unable to find anything in the executive or congressional action prior to the importation of the cargo now in question having the effect to extend the executive order as to the collection of duties during the military occupation to ports and places not within the occupation and control of the United States.

The statement of the facts shows that the insurgent government was in actual possession of the custom-house at Cebu, with power to enforce the collection of duties there, as it did. Such government was of the class of *de facto* governments described in 1 Moore's International Law Digest, § 20, as follows:

> But there is another description of government, called also by publicists a government *de facto* but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1) that its existence is maintained by active military power within the territories, and against the rightful authority of an established and lawful government; and (2) that while it exists it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by civil authority, supported more or less directly by military force. (Thornington *v.* Smith, 8 Wall. 1, 9.)

The attitude of this government toward such *de facto* governments was evidenced in the Bluefields case, a full account of which is given in 1 Moore's International Law Digest, pp. 49 *et seq.* In that case General Reyes had headed an insurrectionary movement at Bluefields and acquired actual control of the Mosquito Territory in Nicaragua. His control continued for a short time only, February 3 to February 25, 1899, and after the re-establishment of the Nicaraguan Government at Bluefields it demanded of American merchants the payment to it of certain amounts of duty which they had been compelled to pay to the insurgent authorities during the period of their *de facto* control. The American Government remonstrated, and the duties demanded by the Nicaraguan Government were by agreement deposited in the British consulate pending a settlement of the controversy. The Department of State of the United States, upon receiving sworn statements of the American merchants to the effect that they were not accomplices of Reyes, that the money actually exacted was the amount due on bonds which then matured for duties levied in December, 1898, payments being made to the agent of the titular government who was continued in office by General Reyes, that payment was demanded under threat of suspension of importations, and that from February 3 to February 25 General Reyes was in full control of the civil and military agencies in the district, expressed the opinion that to exact the second payment would be an act of international injustice; and the money was finally returned to the American merchants with the assent of the Government of Nicaragua.

A similar case appears in 1 Moore's International Digest, p. 49, in which our government was requested by Great Britain to use its good offices to prevent the exaction by the Mexican Government of certain duties at Mazatlan, which had been previously paid to insurgents. The then Secretary of State, Mr. Fish, instructed our Minister to Mexico as follows:

> It is difficult to understand upon what ground of equity or public law such duties can be claimed. The obligation of obedience to a government at a particular place in a country may be regarded as suspended, at least, when its authority is usurped, and is due to the usurpers if they choose to exercise it. To require a repayment of duties in such cases is tantamount to the exaction of a penalty on the misfortune, if it may be so called, of remaining and carrying on business in a port where the authority of the government had been annulled. The pretension is analogous to that upon which vessels have been captured and condemned upon a charge of violating a

blockade of a port set on foot by a proclamation only, without force to carry it into effect.

See also Colombian Controversy, 6 Moore's International Law Digest, pp. 995, *et seq.*

While differing somewhat in its circumstances, the case of United States *v.* Rice, 4 Wheat. 246, is an instructive case. In that case, during the War of 1812, the port of Castine, Maine, was captured by the British forces and during its occupation the British Government exercised civil and military authority over the people, established custom-houses and collected duties on goods. After peace and the re-establishment of the American Government at Castine the collector of customs claimed the right to collect duties upon the goods, and this court held that the duties could not be collected a second time. Mr. Justice Story, delivering the opinion of the court, after stating that the British Government was in full control of the port and authorized to collect duties, said (p. 254):

> Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British Government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties, when imported, or not at all. That they are so liable at the time of importation is clear from what has been already stated; and when, upon the return of peace, the jurisdiction of the United States was reassumed, they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretence to say that American duties could be demanded; and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority.

We observe that the learned justice puts the case of the importation of goods into a foreign territory afterwards ceded to the United States as one which under no pretense would afford an authority to collect duties upon goods previously imported there. We do not think that it was the purpose of the executive order under which the government at Manila was instituted and maintained at the time of this importation to direct the collection of duties at ports not in the occupation of the United States, and certainly not at one actually in the possession of a *de facto* government, as is shown in this case.

It is said, however, that the claimants resided and were doing business at Manila and therefore were subject to the military authority there, and the authority of a conquering power, recognized in New Orleans *v.* Steamship Company, *supra*, 394, to regulate trade with the enemy and in its country is cited in support of the proposition. That there is such general authority, there can be no doubt. It is, however, not without limitation, and a local commander is certainly bound by the orders of the President as commander in chief, which in this case had limited tariff collections to ports and places occupied by the United States. And such authority is subject to the laws and usages of war (New Orleans *v.* Steamship Co., *supra*, p. 394) and, we may add, to such rules as are sanctioned by established principles of international law.

A state of war as to third persons continued until the exchange of treaty ratifications (Dooley *v.* United States, 182 U. S. 222, 230), and, although rice, not being contraband of war, might have been imported (7 Moore's International Law Dig., pp. 683, 684), the authority of the military commander, until the exchange of ratifications, may have included the right to control vessels sailing from Manila to trade in the enemy's country and to penalize violations of orders in that respect. But whatever the authority of the commander at Manila or those acting under his direction to control shipments by persons trading at Manila and in vessels sailing from there of American registration, such authority did not extend to the second collection of duties upon a cargo from a foreign port to a port occupied by a *de facto* government which had compulsorily required the payment of like duties.

It is further contended that, if the collection of duties was originally without authority, it was ratified by the Act of June 30, 1906 (34 Stat. 636), which provides:

> That the tariff duties both import and export imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eighth, nineteen hundred and two, at all ports and places in said islands upon all goods, wares, and merchandise imported into said islands from the United States, or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eighth, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior act of Congress been specifically authorized and directed.

The history of this act and others growing out of the Spanish-American War is fully set forth in United States *v.* Heinszen & Co., 206 U. S. 370.

This court had held that the President had no authority to order the imposition of duties subsequent to the ratification of the treaty, with reference to Porto Rico (Dooley *v.* United States, *supra*), and with reference to the Philippine Islands (Fourteen Diamond Rings *v.* United States, 183 U. S. 176). The Act of July 1, 1902 (32 Stat. 691), was then passed by Congress, ratifying the action of the President in making the order of July 12, 1898, whereby duties had been collected at "all ports and places in the Philippine Islands upon passing into the occupation and possession of the forces of the United States," and amendments of that order, and ratifying such action of the authorities in the Philippines as was done in accordance with the orders of the President. In Lincoln *v.* United States, and Warner, Barnes & Co., Ltd., *v.* United States, 197 U. S. 419, affirmed on rehearing in 202 U. S. 484, the act of July 1, 1902, was construed to apply only to duties collected prior to April 11, 1899 (when the treaty became effective). In this situation, the month following the decision of this court in 202 U. S. 484, *supra*, (affirming the Lincoln and Warner, Barnes & Co., Ltd., cases) Congress passed the ratifying act now in question. United States *v.* Heinszen & Co., *supra*, 381.

Conceding that the act is broad enough in terms to cover tariff duties exacted under the authority of the President's orders before the ratification of the treaty, it is expressly limited to tariff duties, import and export, imposed by the authorities of the United States and of the provisional government of the islands prior to March 8, 1902 (the date of the act of Congress temporarily providing revenue for the Philippine Islands, 32 Stat. 54); and there is no expression of purpose in the statute to enlarge the executive orders of the President, which limited the collection of duties during our military occupation to ports and places actually held and occupied by the forces of the United States, or to ratify collections made where goods had been entered at a port not under American control and in possession of a *de facto* insurrectionary government, as is here shown.

The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law.

The act has the scope given to it in the case of United States *v.* Heinszen & Co., 206 U. S. 370, namely, to ratify "the collection of the duties levied under the order of the President," which, as we have seen, were tariff duties imposed at ports in the occupation and possession of the United States. The tariff duties upon the cargo of rice here in question were paid to the *de facto* authorities at Cebu, where the cargo was entered, and the payment made at Manila was not a tariff duty but an illegal and unwarranted exaction in the nature of a penalty, covered by neither the orders of the President nor the ratifying acts of Congress.

We think the Court of Claims was in error in holding the duties collectible at Manila under the circumstances related, and in adjudging that the Act of June 30, 1906, ratified the conduct of the military authorities at Manila in compelling such payment. Its judgment will therefore be reversed and the case remanded to the Court of Claims with instructions to enter judgment for the claimant.

Reversed.

BOOK REVIEWS

Das Werk vom Haag. Vol. I. *Der Staatenverband der Haager Konferenzen.* By Walther Schücking. pp. xii, 328. Vol. II. *Das Problem eines internationalen Staatengerichtshofes.* By Dr. Hans Wehberg. pp. xx, 243. Munich and Leipzig: Duncker & Humblot. 1912.

Professor Schücking has had the happy thought to edit a series of volumes or monographs dealing with The Hague Conferences. They are to be prepared by the most eminent publicists of the German-speaking world. A volume or monograph is to be devoted to each subject considered by the Conferences and each volume, written in German, is to be issued as it is ready for publication. He has associated with him as collaborators distinguished teachers and authorities on international law, who are interested in the popularization of the Conferences and who will, it is hoped, not only advise Professor Schücking, but will themselves contribute volumes or monographs on subjects about which they may claim to speak as experts. Professor Schücking's idea is to have these volumes appear at irregular intervals, forming a part of a series which he hopes will be as permanent as the Conferences they are to describe and popularize. His fundamental purpose, however, was not to enrich international law with a series of volumes, however admirable, but, by means of the series, to make the work of The Hague better known and, if possible, appreciated at its true value in Germany. Two volumes have already appeared. The first, entitled *Der Staatenverband der Haager Konferenzen*, is by Professor Schücking. The second, entitled *Das Problem eines internationalen Staatengerichtshofes*, is by Dr. Hans Wehberg. If we may judge by the initial volumes, it is more than probable that Professor Schücking will accomplish his purpose, and every friend of the Conferences must wish him well.

It is but natural that Professor Schücking, as the founder and editor of the series, should himself contribute the first volume, and it is as proper as it is natural that this volume should attempt to define the nature and scope of The Hague Conference, as such, the place it occupies among other conferences, and the probable form which it may assume.

It is not the intention of the present reviewer to examine at length Professor Schücking's views, or to subject them to a detailed criticism, but, rather, to state his fundamental conceptions, and to advise the reader who understands German to master the book, and to inform the reader who is unfamiliar with German that an English translation of the first two volumes of the series will shortly be issued by the Division of International Law of the Carnegie Endowment for International Peace.

Professor Schücking's views may be briefly stated: He believes that a definite political union of the states of the world has been created by the First and Second Conferences, that the various agencies created by the Conferences are not merely agents or organs to carry out the purposes for which they were created, but that they are agents or organs of the union; that is to say, the so-called Permanent Court of Arbitration is not merely the agency of the two or more parties constituting the special or temporary tribunal for the trial of an individual case, but that the court and its tribunal are in fact the organ of the union and administer justice not merely in the name of the parties constituting the tribunal, but in the name of the states forming the union. This is indeed a radical conception, but it is a logical deduction on the assumption that the union of the states, of which The Hague Conferences are the evidence, is a political and organic union. The writer of this review prefers to consider the union, in so far as the administration of justice is concerned, as a public union, of the type, for example, of the Universal Postal Union. After a careful discussion of the nature of the Conference, the services which it has rendered and will undoubtedly render, if it be held at regular stated intervals—ten years, in his opinion, would be often enough—the author proposes that the Third Conference adopt a convention defining the aim and purpose of the Conference, the period at which it shall meet, the procedure to be followed by it in the conduct of its business, and the details necessary to perfect its organization. The provisions of the draft convention which he proposes are in the nature of a codification of the practice of the nations, in so far as The Hague Conferences are concerned, and do not express the author's views concerning the probable or desirable development of international organization. His personal views are contained in Chapter 5 and, while entitled to great respect and consideration, they will undoubtedly be considered as somewhat radical. The present reviewer has no desire to match his views against those of Professor Schücking, and the purpose

of this review is, as stated, to call attention to Professor Schücking's very able volume, to express the hope that it may be widely circulated in German, as it will stimulate thought and provoke discussion, and that it may be even more widely read in its English translation. For whatever may be thought of the correctness of Professor Schücking's point of approach and the conclusions which he reaches, there can be no doubt that the *Staatenverband der Haager Konferenzen* is not only an admirable introduction to the series of volumes and monographs to be devoted to the work of The Hague, but also a distinct contribution to one of the most important and hopeful phases of international life.

Dr. Wehberg's monograph on the problem of an international court of justice is a very remarkable performance, and can not be read by any person to whom the German language is familiar without admiration for the skillful manner in which he has discussed the various problems connected with an international court and without a feeling of gratitude for the balanced judgment and the spirit of fairness which he has displayed in the attempt to solve the problems connected with the proposed court, which are both many and difficult.

Dr. Wehberg approached the question of an international court of justice with considerable misgivings and, in a previous publication, he declared himself to be a partisan of the so-called Permanent Court of Arbitration and opposed to the establishment of a truly permanent court composed of professional judges acting under a sense of judicial responsibility. Study and reflection, however, have convinced him of the necessity of the latter court, and the volume under review is calculated to strengthen the faith of those who believe in the proposed court and to persuade many doubters and waiverers who are open to argument.

Dr. Wehberg believes that international law must be developed in order more adequately to meet the world's needs, that the conflicts inevitably arising between nations in so far as they are of a legal character can best be decided by a court of justice composed of permanent and professional judges, whose duty it will be both to find and to apply the principle of justice decisive of the conflicts submitted to the court, and that such a tribunal can safely be entrusted to develop the system of law, as is the wont of courts, which it applies to the decision of concrete cases. He believes, and rightly, that the nations appearing before the

court should not be represented by judges upon the bench, as the presence of national judges is not only embarrassing in itself, but tends to question the impartiality of the decision. He is inclined to think that the framers of the so-called Permanent Court of Arbitration devised by the First Hague Conference did not intend to create a judicial tribunal, that their purpose was to provide machinery for the adjustment of a dispute rather than for its decision according to principles of law, and he cites on this point the views not only of delegates of the First but also of the Second Conference in support of his contention. The question is one of no little difficulty, but whether the partisans of the so-called Permanent Court of Arbitration meant it to be a judicial tribunal, Dr. Wehberg is very clear in his mind that it is not and that an international court of justice in the technical sense of the word should be created. It is refreshing to find that Dr. Wehberg has not allowed himself to be led by false analogies and that he rejects as unsuited to the international tribunal the execution of their judgments by means of force. Dr. Wehberg approves the project of the Court of Arbitral Justice drafted by the Second Hague Conference, and his ninth chapter is a brief and serviceable comment upon it. The writer of this review has devoted much thought and attention to the question of a permanent court of justice, and he commends this volume to the interested public as the best statement of the problems connected with the necessity and organization of an international court which it has been his fortune to read; and, as an evidence of his sincere appreciation of the book and the services which he can render for the cause for which it was written, he begs to state in conclusion that he has made arrangements, as Director of the Division of International Law of the Carnegie Endowment for International Peace, to have the work translated into English by a competent person and to have it published under the auspices of the Endowment.

JAMES BROWN SCOTT.

La Doctrina Drago. By Alfredo N. Vivot. Buenos Aires: Imprenta y Casa Editora de Coni Hermanos: 1911. pp. 395.

The author sets forth his purpose in the following sentence:

> My desire has been to produce a brief study of the doctrine and the discussions which it has occasioned; to search for its true significance and its exact compass; to record the circumstances which gave rise to it and the vicissitudes of its fitful existence; and to study its economic, juridical, and political foundations, and the criticisms and comments of which it has been the object.

He says the subject is generally supposed to be easy and of slight interest and not sufficiently important for a doctoral thesis in jurisprudence; but declares that he had been guided in his choice of it solely by his belief in its great interest. As evidence of its importance he recites the names of several prominent internationalists who have published studies of it; and concerning its ease he declares that after working over these studies and the works of reference he had found necessary he is able to affirm from his own experience that even an inadequate study of the doctrine requires a vast combination of knowledge and a sound and just legal judgment. Apparently foreseeing that this apologetic and self-laudatory introduction would provoke criticism, he says it is not intended as a ready-made eulogy but merely as an explanation.

In his first chapter on "Antecedents" the author studies the affairs of Venezuela, internal and foreign, which furnished the occasion for Drago, Minister for Foreign Affairs of Argentina, to address the note of December 29, 1902, to the Argentine minister in Washington, which note contained the declaration that has since become famous as the Drago Doctrine. The political dissensions of Venezuela, especially the revolution of 1899 which elevated Castro to power and the struggles he was compelled to engage in to retain the power, gave rise to a series of diplomatic reclamations for losses arising from various causes. The idea of employing national armed forces to aid in the collection of these claims had its rise in Germany, where there was a certain money-lending firm which had financed the building of a state railway in Venezuela. The Venezuelan Government had not met its obligations to the company, and even the interest had not been paid with regularity. The forcible collection of these obligations was the real purpose of Germany; but as the ostensible reason for her position that government invoked certain damages caused to the persons and goods of her subjects resident in Venezuela. The purpose of England was not originally to protect her foreign bondholders, although later she took advantage of circumstances to do that also; but at first her claims were based on certain outrages asserted to have been inflicted on British ships and subjects, thus offending the dignity and honor of the nation. The fact that there was strong reason to believe that many of these British ships and subjects had been aiding the revolution or engaged in contraband trade did not deter England from joining Germany in coercing the Venezuelan Government. Italy demanded, as reason for joining the other two Powers in coercing Venezuela, reparation for losses occasioned to her subjects by

the civil wars in that country during the preceding four years. In concluding his twenty-eight page study of these antecedent conditions, the author reviews briefly the presentation on December 7, 1902, of the joint ultimatum, the seizure two days later by the combined fleets of the two Venezuelan ships, and the subsequent establishment of the pacific blockade.

The second chapter is entitled "The Drago Doctrine." To give a full and clear conception of the doctrine, he studies together the statements of Drago not only in his famous note, but also in an article subsequently published and in an address delivered in the Second Hague Conference. Variations of the declaration against the employment of armed intervention to collect public debts, which was the most essential point of Drago's note, soon began to appear. The first was an allusion in Secretary Root's instructions to the United States delegates to the Pan American Conference at Rio Janeiro. He spoke of the principle that contracts between a nation and an individual are not recoverable by force as being embodied in the Drago note. A committee report at the Rio Conference recommended the extension of the principle so as to include not only public debts but all obligations of an exclusively pecuniary character, and the conference embodied the idea in its invitation to the coming Hague Conference to discuss the matter. At the Hague Conference Dr. Drago endeavored to limit the principle to the matter of public debts as he had originally enunciated it. The latter half of the second chapter is devoted to a discussion of the confusion that has arisen concerning the true authorship of the doctrine. He explains how it came to be known in some places and for some time as the Calvo doctrine. He refutes the idea that it had really originated with Alexander Hamilton a century earlier; and denies the statement that Palmerston should be accredited with its authorship.

Nearly all of the third chapter, covering more than fifty pages, is occupied by a review of the debates in the Second Hague Conference on the subject of the employment of armed force to assist in the collection of obligations owing by a state to citizens of another state. The United States delegation, led by General Porter, argued for a limitation of the employment of armed force in the collection of such debts. Drago stuck to his original proposition prohibiting the employment of such force. Finally a modification of the proposition of the United States was agreed upon, with reservations on the part of certain states, declaring against the resort to armed force unless the debtor nation should refuse or fail

to reply to an offer to arbitrate, or resist the findings of the arbitral court. Thus the original idea of "no employment of force" was exchanged for "a limitation upon the employment of force." The various similarities and differences between the Drago Doctrine and the Hague Convention are pointed out in detail.

The fourth chapter studies the economic foundation for the Drago Doctrine and shows the abuses and practical inconveniences that would arise from the acceptance of the principle of the forcible collection of public debts. The fifth and sixth chapters study the legal foundations setting forth the legal nature of a public debt; the relations between the debtor nation and its creditors; and the relations between the debtor nation and the nation whose nationals are its creditors. The seventh and last chapter is occupied with an exposition of the political foundations for the doctrine. It studies the character, the origin, the evolution, and the applications of the Monroe Doctrine, and shows the relation of the Drago Doctrine to it, asserting that the latter is a necessity for the former. Although the Hague Convention is not so strong in its declaration against the employment of armed force in the collection of public debts as Dr. Drago's original statement, yet it embodies the essential principle and practically accomplishes the purpose of the illustrious Argentinian publicist, to whom the chief credit is properly given for the establishment of the principle.

The appendix quotes in full the Drago note of December 29, 1902. As is too frequently the case in Spanish books, there is no index. The bibliography gives the titles of some seventy books and articles which the writer says is far from being a complete list of works discussing the doctrine. The author's style is very interesting, though, as is likely to be the case in a work based so largely on magazine articles and public addresses, it is somewhat discursive. Its value as an authority is lessened by its very evident tone of hero worship throughout. In every place where any question arises concerning the relative merits of Drago and any other man, the author assumes the rôle not of a judge but of an advocate.

WILLIAM R. MANNING.

The First Hague Conference. By Andrew D. White. Reprinted from Dr. White's autobiography. Boston: The World Peace Foundation, 1912. pp. vi, 123.

Mr. Meade was well advised to gather together the passages dealing with the First Hague Conference from Dr. White's interesting and valu-

able autobiography and to publish them in separate form. It is not meant to suggest that they were hidden away in the autobiography and lost to the general reader, but many people would not have supposed that the autobiography of the man of affairs, dealing with many subjects of interest, contained the most important account of the First Conference from day to day which has hitherto been published, but such is the fact, and the public, thanks to Mr. Meade, has its attention called to Dr. White's account, which is so brief that it can be read at a sitting and so accurate that it needs little or no correction from other sources.

Dr. White kept a diary during every day of the First Conference, at which he had the honor to represent the United States as chairman of the American delegation. He jotted down the occurrences of the Conference from day to day, with the result that the little volume now separately published enables the reader to appreciate the feelings of despondency with which the Conference met, the gradual growth of an interest in its proceedings, and the means by which what promised to be a failure became a great and unqualified success.

If it be noted that Dr. White enlightens his narrative with sketches of the leading personalities, often repeating conversations, and that the social events connected with the Conference are duly chronicled, and that he has gathered up and preserved the amusing incidents which came to his notice, the general reader who is not interested in the Conference itself, or its results, will find the little book as agreeable and fascinating as a novel.

To the specialist, however, these brief entries are of priceless value to which he will turn not merely for a record of actual happenings, but for the views of a distinguished, interested and effective participant in the First Peace Conference held at The Hague. It is to be hoped that these are but extracts from the diary and that Dr. White's full account will some day be given to the public. In the meantime the little book will both interest and instruct the public.

JAMES BROWN SCOTT.

Die Zweite Haager Friedenskonferenz. By Otfried Nippold. Part I. Das Prozeserecht, pp. 231, lxxxxii. Part II. Das Kriegsrecht, pp. 267, xvii. Leipzig: Duncker & Humblot. 1908 and 1911.

Professor Nippold, well known for his admirable work entitled *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten*, which ap-

peared on the eve of the Second Hague Conference, has written a careful and minute examination of its proceedings and its results. The first part, devoted to procedure, appeared in 1908; the second part, devoted to the action of the Conference on the question of war, with reference to the Declaration of London, appeared in 1911. It was to be expected from a publicist of Professor Nippold's standing that his work would be accurate, and the reader who consults it will not be disappointed. And it would likewise be expected that Professor Nippold should, in the course of the work, reiterate the views so forcibly expressed in *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten*, written in view of the approaching Second Conference, and in this case too the reader would not be disappointed.

It is not the reviewer's intention to consider in detail Professor Nippold's statements based upon the proceedings of the Conference. Suffice it to say on this point that a very careful reading of the volume shows that the work has been conscientiously done and that the reader may rely with confidence upon Professor Nippold's statements of fact. The point of view from which the book is written is that of a professed believer in arbitration, although the parts relating to war are carefully and adequately discussed. While thus commending the book without reservation, as to facts, the present reviewer is not so sure of the conclusions which Professor Nippold draws from them, and he would like to call attention to Professor Nippold's treatment of the proposed Court of Arbitral Justice as unsympathetic, if indeed it be not based upon a misapprehension of it and of the service which it could render. The learned author evidently looks upon international arbitration as an ultimate development, instead of seeing in it a transition from self-redress to judicial settlement. It is true, as laid down by the First Conference, that the object of arbitration is the settlement of international disputes by arbiters or judges of the parties' own choice and on the basis of respect for law. It does not necessarily follow, even if this be admitted, that the choice of judges to be called upon to decide a controversy shall be made by the parties on the eve of submitting the controversy, or with respect to any particular controversy. Nor does it follow that the nations might not constitute an arbitral board, agree upon its composition, and invest it, thus constituted, with jurisdiction over any or all controversies of an arbitrable nature which might arise among them. Freedom of choice does not necessarily consist in choice at any one time, and it is difficult to see how the selection of arbiters might not be made

with equal propriety before, as after, the controversy has arisen. This is, however, a minor matter.

Professor Nippold believes that the creation of the proposed Court of Arbitral Justice would, if the expression be permissible, denature arbitration. This result does not necessarily follow, because the proposed court is not to displace the so-called Permanent Court of Arbitration, but to exist alongside of it, leaving the nations free to form a special or temporary tribunal with arbiters of their own choice, should they so desire, or to refer the controversy to a permanent tribunal whose composition is known in advance. Which is the better institution may well be a matter of doubt, and some publicists prefer the present system of arbitration, others the judicial settlement of legal questions by a Permanent International Court of Justice composed of judges by profession. Professor Nippold prefers the former, the reviewer the latter, method. The reviewer, however, cheerfully admits the services which arbitration has rendered in the past and believes that temporary tribunals will be created in the future and render like services. He believes, however, that there is a difference between the settlement of international disputes "on the basis of respect for law," to use the language of the Convention for the Pacific Settlement of International Disputes, and the decision of legal controversies by the passionless and impartial application of principles of law.

Nations which have practiced arbitration for centuries, such as Switzerland, of which Professor Nippold has the honor to be a citizen, have discarded arbitration for judicial settlement, and it is believed that the reasons which led Switzerland will lead nations in the long run to prefer the judicial settlement of legal questions by a Permanent Court of Justice, although they may prefer, and in the writer's opinion they will prefer, to submit questions of a political nature, although involving law, to temporary tribunals, whose judges they can appoint, whose actions they may hope to control, or whose opinions or past conduct leads them to expect a favorable decision. Which method is the better, time alone can tell, and it seems better to approach a question with an open and an unbiased mind, rather than to insist that a different development is unacceptable because it is different. On this point the reviewer would suggest Dr. Wehberg's book entitled *Das Problem eines internationalen Staatengerichtshofes* as an antidote to Professor Nippold's views on the subject.

JAMES BROWN SCOTT.

Japan and Japanese-American Relations. Clark University Addresses. Edited by George H. Blakeslee. New York: G. E. Stechert & Co. 1912. pp. xi, 348.

This volume consists of a series of twenty-two addresses delivered at the Clark University conference upon international problems in 1911. Seven of the lectures were given by Japanese scholars, the others by various Americans, some of them missionaries, qualified by their general reputations to speak on the subject. A number of the lectures have already appeared in the *Journal of Race Development* and are now assembled in book form for convenience.

As is inevitable in a joint work of this sort, there is little continuity. And despite the plan to have each lecture deal with a distinct topic, there is more or less repetition.

A few of the addresses deal with the legal aspects of Japanese-American relations. One of these, "The Family of Nations Idea and Japan," is a simple account of the steps by which Japan secured the recognition of full sovereignty. Another "The Evolution of Japanese Diplomacy" takes the ground that, as there is at present no open door for Asiatic immigrants in other continents, though all the while the Powers insist upon free entrance of all mankind into Asia, the highest aim of Japanese and Chinese diplomacy must be a revision of the relations of Asia to the rest of the world on this matter. In the same address there is a passage which is best quoted:

> In the war with Russia "Japanese forces were victorious both on land and sea, but—Japanese diplomacy was again outwitted by its adversary over the chess board at Portsmouth, all this largely because Japan neglected to interest the press of the world in her cause and claims, while the Russian side of the story was ably, tactfully and appealingly presented to more than one hundred journalists of all nationalities. * * * Russian diplomacy was particularly successful in so pleading its case to the American government, through its chief executive, and to the American public, through the press, as to arouse the vague but none the less disquieting fear that Japan might one day occupy both the Russian and Chinese coasts of the Asiatic Pacific, and next descend upon the Philippines, Guam, Hawaii and finally upon the Pacific slope of this western continent. This to our view was the true inception of the rumors of a pending conflict between the United States and Japan."

The chapter "A Literary Legend: The Oriental" makes up in warmth for what it lacks in length. Its author, Mr. Griffis, declares that

> poet, dramatist, sentimental writer, novelist and maker of sensational machinery for the stage, picture show and quick-selling newspaper have created the "Oriental"

of imagination, fancy, prejudice and bigotry, who has no counterpart in reality, or has never existed. * * * Such a delineation * * * has mercantile value. It pays in what the American loves so dearly—money. * * * To one who has lived among the Japanese and knows something of their history, literature and art it is impossible to agree with the impressionist Hearn, of the vile traducer whose motive directly or indirectly is fame or cash. * * * After nearly the whole of an adult life spent directly or indirectly with "the Orientals," as in large part were the lives of my father and grandfather before me, and with an honest perseverance and fairly steady industry in research, I see absolutely no difference in the human nature of an Asiatic, a European or an American.

These are strong words, and coming from one so well qualified to know, they cannot be ignored. Science has not as yet declared that there is a fundamental difference between occidental and oriental. Why then should the irresponsible writer be permitted to assume it—to our cost?

As was to be expected, these lectures show decided pacific leanings. They put pronounced emphasis upon the factors tending to draw the United States and Japan together, and the effect of the whole is to leave the feeling that the various contributors are too sanguine. Granted that there is no real difference between orientals and occidentals, the popular belief that there is, however it originated, jeopardizes amicable relations. Granted, too, that common sense would dictate peace between us and Japan because of our trade relations and traditional friendship, it must not be overlooked that wars too often begin just because common sense gives way to foolishness. These addresses attempt to dispel some of the popular misconceptions which cause nations to do foolish things, and for that reason they are welcome.

EDWARD B. KREHBIEL.

Jahrbuch des Völkerrechts. Edited by Th. Niemeyer and K. Strupp. Munich and Leipzig: Duncker & Humblot. 1913. pp. viii, 1556.

The first issue of the *Jahrbuch des Völkerrechts* is a formidable, though not a forbidding, volume, but it is one which no person interested in international law and international relations can afford to overlook. It has a separate and distinct place on the table of the man of affairs, as well as of the expert, because it gives a survey of international development from September, 1911, to August, 1912. It does not compete with journals of international law, nor with accounts of the year's happenings, in so far as they concern international relations, to be found in encyclopedias.

It gives the texts of the most important documents bearing upon international relations, using for this purpose the language of the original document, be it in French, German, Italian, Spanish, or English. This alone would make the work valuable as a book of reference, but its usefulness does not stop here.

It has separate articles and reports on the important events and questions of the year written by persons who can justly be called specialists on the different subjects, reports upon the events which have taken place in the individual countries, and reports on congresses and conferences.

It has a section devoted to the signing and ratification of international agreements, a section devoted to subjects such as the proposed Academy at The Hague, the preparations for the Third Hague Conference, and the Pan-American movement, to mention only a few subjects which may be considered to be timely or to have a general interest. It has a bibliography and it ends with an index.

The question must be unimportant which this volume does not discuss, and no well informed reader can consult it without finding what he seeks, unless the subject is beyond the scope of the volume. In a word, the work is indispensable, and Messrs. Niemeyer and Strupp are to be congratulated upon having conceived the idea and upon their patience and industry in adequately carrying it out.

It has been stated that important documents are printed in various foreign languages with which the reader and student are supposed to be familiar. The same thing applies to the articles and reports. German, French and English are used, although, so far as the reviewer can discover, there is no Spanish article, and the contributions of Italian writers have been translated into German. This, of course, enables readers of different nationalities to use the volume and makes it appeal to a wider public as a book of reference. The editors recognize, of course, that certain subjects of a political nature will naturally betray the sympathy and bias of the writer with an action or policy with which his country is concerned. This cannot be avoided, but the editors have supplied a corrective. Thus, to cite an example or two, the Panama Canal question is treated by an American writer, who defends the action of the United States, but it is followed by an article from an English writer who explains and justifies the English point of view. In the same way, the Morocco question is treated by a French writer and the corrective is supplied by an article from the pen of one of the editors, Dr. Niemeyer.

As the *Jahrbuchs de Völkerrechts* is calculated to disseminate correct views of international law and international relations, the AMERICAN JOURNAL OF INTERNATIONAL LAW welcomes its publication and wishes its editors and publishers success in their great and beneficent undertaking.

JAMES BROWN SCOTT.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For table of abbreviations see Chronicle of International Events, p. 139]

Aerial Law. Stand des Militärluftfahrwesens bei den Armeen des Dreibundes und des Dreibandes, Der. Deutsche Runds., *40*:406. Dec.

Africa. Rivalité anglo-alemande et le partage de l'Afrique centrale, La. *Pierre Taf.* Q. dipl., *36*:641.

Albania. Albania. *E. J. Dillon.* Contemp. R., *104*:879. Dec.

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SUPPLEMENT—IMPORTANT TEXTS OF AN INTERNATIONAL CHARACTER

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THE AMERICAN PHILOSOPHY OF GOVERNMENT AND ITS EFFECT ON INTERNATIONAL RELATIONS

Until quite recent times, it would have been unprofitable, in the case of most nations, to inquire what the philosophy of government held by the people was, or what effect it had on the foreign relations of the nation, or on international relations generally. There were few nations in which the people were so enlightened and expressed themselves so fully that it was possible to distinguish and define the particular philosophy of government held by them; and even if it had been possible to do so, it would have been of little use to try to discover what effect this philosophy had on international relations, since the fact was that it had little or no effect. The people of each nation, ignorant of foreign affairs by reason of the difficulties of travel and communication, allowed the executive to control the foreign relations under the advice of a council in the selection of which they had no voice, and representing certain privileged classes of persons who used the power of the nation as means to accomplish such ends as they thought desirable.

So long as this condition of things was general, the rights of nations occupied the attention of writers. The rights of man, the rights of peoples, and the rights of society in general were ignored, as were the responsibilities which necessarily accompany all rights. Each nation sought to aggrandize itself by conquering and pillaging others, and the only restraint on one nation trespassing upon another was that all the so-called civilized nations were gradually forced, by the pressure of circumstances, to enter into the playing of a military game of forcible checks and balances, called "the balance of power" or "the political equilibrium."

The principle of this game was very simple, though, like most other games, the rules for playing it were very intricate. When any nation, for the purpose of direct gain by pillage of its neighbors or by despoilment of the natives of barbarous regions, or for the purpose of indirect gain by

destroying its competitors in trade or opening up new trading points, desired to conquer adjacent or distant regions,—thereby increasing its military and naval strength and paving the way for further expansion,—the surrounding nations combined their military and naval strength by alliances until the proposed expansion was balanced and checked, or until the opposing nations, or all the nations concerned, were "compensated" by partitioning between them some weak country which had been crushed in the course of the war. Thus what was called the *status quo* or the "political equilibrium" was maintained.

So long as the people of each nation remained unenlightened and were without full power to express their ideas through representative institutions, the war-game of "the balance of power" ruled international politics, and international disputes were disputes concerning the "rights of nations," and particularly on points of "national honor." The citizens of each nation had only partial and indefinite rights at home, and citizens of one nation had no rights in another nation or against a foreign government. A person abroad had only certain privileges, and these usually were based on treaty. Breaches of treaty were considered to involve the national honor not of the nation breaking the treaty, but of the other nation, and led to war or to a new disposition of alliances according to the rules of the war-game.

As the people became more enlightened, and obtained an increasing participation in their own government by representation and by compelling their governments to be responsible to them, there gradually arose in each nation a popular philosophy of government, in which the rights of individuals, of peoples, and of human society in general, were distinguished from the rights of nations. The houses of representative legislatures, and particularly the houses directly representing the people of the nation, as their members became increasingly better informed concerning foreign affairs through increased facilities for travel and intercourse, insisted with greater and greater force that the philosophy held by the people should have its effect upon foreign relations as well as upon domestic affairs. The war-game of the balance of power everywhere came under criticism. At the present time its principles are beginning to be known, and there is a growing understanding of its intricate rules. The classes and interests which have heretofore had the

monopoly of this knowledge, and which in all sorts of secret ways were able to use the nation and determine its moves, are being haled into the daylight and exposed to the destructive power of publicity. Indeed the danger at the present time is, that in the control by the people of each nation over national and international affairs, the just rights of nations to live and protect themselves, and to be the guardians of the rights of individuals, of peoples and of society at large, will be ignored, and that the whole structure of organized society will be weakened, to the detriment of individual liberty.

It becomes, therefore, important to consider the philosophy of government held by the people of each nation, and particularly of those which have advanced farthest along the path of popular government, for the purpose of ascertaining how this philosophy is likely to affect international relations. It is particularly desirable to consider the philosophy held by the people of the United States, and extended to its annexed countries, since this is one of the two great philosophies of popular government now prevailing in the world; the other being that held by the people of Great Britain, which has extended more or less completely to the self-governing states of the British Empire, and to the nations of the Continent of Europe.

Every philosophy of popular government tends to the establishment and enlargement of the rights of the individual. When we speak of "popular rights," we mean the rights of the individual. It is true we may speak of the rights of one people against another, or the rights of society against peoples, but these are figurative expressions. They all come down, in the last analysis, to the rights of the individual. The important thing, therefore, in examining a philosophy of government held by the people of a nation is, to reach a definite idea concerning what the rights of the individual are under this philosophy, into what classes and grades they are divided, how they are considered to arise, whether they are considered to be against the government or against all governments as well as against other individuals, and how it is considered they ought to be safeguarded.

The crux of the whole matter is, however, whether the individual, according to the philosophy of government held by the people of the nation has rights against the government, and, if so, why and to what

extent? It is particularly important to inquire whether they base the rights of the individual against the government on grounds which logically require them to hold that all individuals have rights against all governments. If the people of a nation do hold that there are rights of individuals against governments, and particularly if they hold this idea for reasons which, logically followed out, require them to hold that all individuals have rights against all governments, this philosophy is bound to have an effect upon international relations.

There can be no doubt but that the proposition that there are certain rights of the individual against the government does form the most fundamental part of the American philosophy of government. We are accustomed to see every branch of our government carefully scrutinizing every governmental action lest it may be found to infringe certain rights of the individual. Every governmental agency, from the Congress and the President downwards throughout the United States, and from the Legislature and Governor downwards throughout the States, is bound by certain express constitutional prohibitions which are designed for the protection of these rights, and if these constitutional prohibitions are infringed by governmental action, the action is nullified by the Supreme Court of the United States or by the court of final jurisdiction in the State. Thus the conception that there are certain rights of the individual against governments, which no government can infringe except upon penalty of having its act nullified, is a very living one among the people of the United States.

If the people of the United States held that these rights were merely rights which they thought it expedient for their citizens to have, their citizens would have these rights merely as citizens. Such a doctrine would make little difference to the rest of the world. Any rights which we think it merely expedient that our citizens should have at home are of course of little effect abroad. But we do not base our belief in these rights of the individual against the government upon any grounds of national expediency. We assert that every citizen of the United States has certain rights against all other persons and against all governments, because these rights arise out of the necessities of human nature and because it is essential to human society that every individual should have these rights. We say that these are "fundamental rights" and

are not only universal but are "unalienable"—that is, that persons cannot convey them to governments and thereby give governments absolute power over them. This makes our philosophy international, as well as national. Our people and all who dwell in our midst or under our jurisdiction, have fundamental rights against our governments not merely as citizens of the United States, or as under its protection or jurisdiction, but as human beings living in the society of other human beings. These fundamental rights, according to our philosophy, must therefore arise under a law growing out of the necessities of human nature, which is supreme over the United States and over all individuals, peoples and nations, and which arises from the act of a legislator external to the United States.

What then, are these fundamental rights which thus arise under a law made by the legislative act of a power external to and supreme over the United States, and what is this external and supreme law under which we consider these rights to exist?

The Declaration of Independence contains the only affirmative statement concerning these fundamental rights and this external and supreme law. In the preamble, it is said: "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Thus the Declaration divides all rights of individuals into two classes. In the first class are certain unalienable rights with which each man is endowed by his Creator, and among which are the rights of life, liberty and the pursuit of happiness; in the second class are all other rights. This first class the Supreme Court of the United States calls "fundamental rights"; the second class it calls "artificial or remedial rights," since the rights of the second class must be consistent with and in aid of those of the first class. The fundamental rights are "recognized, but not created, by the Constitution" [1]—that is to say, by the people of the United States, through the Constitution. The artificial or remedial rights are created by the people or the government of the United States or by the peoples or the governments of the

[1] Logan *v.* United States, 144 U. S. 263, 293.

States. The Supreme Court says of these rights that they are "peculiar to our own system of jurisprudence": [2] thus distinguishing them from fundamental rights, which are of course, in our view, common to every system of jurisprudence, including the international system.

The definition of the fundamental rights of the individual as including his rights of "life, liberty and the pursuit of happiness," given in the Declaration, is too indefinite for practical use. When, however, we go back to the literature of the Revolutionary period and use it as a contemporary exposition of the meaning of these words, the definition becomes clear and practical. The fundamental or common rights are those corresponding to the common attributes which all men have as a necessary part of their human nature and as essential to the existence of human society. These attributes are life, the power to move and the power to use lands, things and forces in the pursuit of happiness. Inasmuch as these common attributes with which all are equally endowed by and at their creation give rise to common necessities, it follows, as we believe, that there must be a supreme and fundamental law of human society recognizing these common attributes and these common necessities and conferring rights upon each individual to satisfy his necessities. The fundamental rights of the individual may thus be stated to be the right to so live, to so move and to use such part of the land, things and physical forces of the universe for his support and happiness, as is consistent with the common and equal right of every other individual to such life, to such motion, and to the use of lands, things and forces for the same purpose. Though these fundamental rights cannot be alienated by any individual to any person or government, the individual may of course forfeit them to society for anti-human and anti-social acts done by him, and it is the function of governments, subject to the ultimate superintendence of the people of each nation, to adjudicate the total or partial forfeiture of these rights by due process of law and to enforce forfeitures so adjudicated. The right of an individual to use exclusively lands, things or forces, which we call property, is evidently to some extent a fundamental right and to some extent an artificial right. Thus the Declaration does not regard property as a fundamental right. On account, however, of the difficulty of determining the extent of property

[2] Downes *v.* Bidwell, 182 U. S. 244, 282.

which the individual may own as a matter of fundamental right, we protect all the property which an individual owns, equally with his life and liberty, so as to prevent it from being taken from him "without due process of law,"—thus requiring proper legislative action, proper judicial determination and proper executive action as a precedent to the forfeiture.

The nations which recognize the fundamental rights of the individual have various expedients for safeguarding them. These rights may evidently be infringed by individuals or by governments. The courts in every civilized country are the especial guardians of fundamental rights in so far as the customary law is concerned. Courts everywhere refuse to apply customs as rules of law when the customs are contrary to fundamental rights. But when the legislature has enacted a law, the courts of most nations are powerless to consider whether it infringes the fundamental rights of the individual. Thus, in most nations, the individual has no rights against the government, or at least against the legislative branch. Experience has shown, however, that each individual has quite as much to fear from the action of governments—even from the popular legislatures—in infringing his fundamental rights as from other individuals. A government, or the legislative part of it, is, after all, only a group of individuals, and it may, like any other group of individuals, violate the fundamental rights of individuals. Even if the government is directly responsible to the will of the majority of the electors, the majority may compel the government to violate the fundamental rights of the individual unless some way is found for nullifying such governmental acts even though commanded by the majority. The British system of responsible government recognizes the fundamental rights of the individual, but gives no protection to the individual against infringement of his rights by the government except by concentrating responsibility in a small committee called the Cabinet, and making the tenure of office of the Cabinet depend upon its having a majority in the popular House. The theory is that if the Cabinet attempts to induce any branch of the government to infringe the fundamental rights of the individual, or sanction such an infringement, it will lose its majority and go out of power, to be supplanted by a Cabinet which will see that these rights are protected.

The people of the United States have adopted a different method of protecting these fundamental rights. In the Constitution of the United States, and in the State Constitutions, are inserted prohibitions upon certain forms of governmental action found by experience to be likely to occur if not prohibited, and which endanger or destroy the fundamental rights of the individual. These prohibitions are the most fundamental parts of the Constitution, and no governmental powers can be exercised contrary to them. That is to say, they are supreme over all the rest of the Constitution and over all governmental action which the particular Constitution affects. The Supreme Court of the United States has said—to repeat what has been above quoted with its immediate context—that there are "certain fundamental rights, recognized and declared, but not granted or created by the Constitution, and thereby guaranteed against violation or infringement by the United States, or by the States, as the case may be." [3] The following is a collation of the provisions of the Constitution of the United States, prohibiting certain kinds of governmental action by the Government of the United States for the protection of fundamental rights, which has received the approval of the Supreme Court.[4]

That no person shall be deprived of life, liberty or property, without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense;

[3] Logan *v.* United States, 144 U. S. 263, 293.

[4] This collation was made in the Instructions of the President to the Commission for taking over the Civil Government of the Philippines from the Military Authorities, dated April 7, 1900, and is quoted in Kepner *v.* United States, 196 U. S. 100, 123. In those instructions it was declared that "there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom," and that "there are certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law." The above quoted constitutional prohibitions were spoken of as the "rules of government" which are "inviolable." See further on this subject an article on "The American Philosophy of Government and its Application to the Annexed Countries," by the author of this article, in the Proceedings of the American Political Science Association for 1913, Vol. 10, p. 76.

that excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense, or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed.

The Supreme Court has said of this collation of Constitutional prohibitions: [5]

These words are not strange to the American lawyer or to the student of Constitutional history. They are the familiar language of the Bill of Rights, slightly changed in form, as found in the nine amendments to the Constitution of the United States, with the omission of the provision preserving the right of trial by jury and the right of the people to bear arms, and adding the prohibition of the thirteenth amendment against slavery or involuntary servitude except as a punishment for crime, and that of Art. 1, § 9, to the passage of bills of attainder and *ex post facto* laws. These principles * * * were carefully collated from our own Constitution, and embody almost verbatim the safeguards of that instrument for the protection of life and liberty.

The Supreme Court has itself definitively attached to the rights secured by these Constitutional prohibitions the name of "fundamental rights." [6]

Substantially these same Constitutional prohibitions against governmental action are inserted in the Constitutions of the various States of the Union. Through the interpretation and application of these prohibitions of the Constitutional Bill of Rights, made by the Supreme Court of the United States as respects governmental action of the United States, and by the courts of final jurisdiction in the States as respects governmental action of the States, the principles of this supreme universal law under which the fundamental rights of the individual

[5] Kepner *v.* United States, 195 U. S. 100, 122, 123.

[6] Hawaii *v.* Mankichi, 190 U. S. 197, 217; Kepner *v.* United States, 195 U. S. 100, 123; Dorr *v.* United States, 195 U. S. 138, 144, 148.

exist, are being gradually evolved by a process of exclusion and inclusion. Of course the courts cannot be allowed to have absolute finality in making decisions of such great importance, which involve the interpretation and application of a law which is supreme over the people of every nation and over every nation, and the nullification of acts of popular legislatures. Where decisions made by courts are believed by the people of the nation to have been based on a wrong interpretation or application of these fundamental constitutional prohibitions—that is, on a wrong interpretation and application of this supreme universal law—the people of each State or of the nation may and doubtless ought to arrange for some appropriate process of revision, but every revisionary process must be so arranged and safeguarded that it will be most likely to result in the fundamental rights of the individual being secured to him. The practice of intrusting the courts of final jurisdiction with this great function is on the whole satisfactory to the people of the United States, since if the courts err they may also correct themselves in later decisions; and the theoretical right of the people to provide a revisionary tribunal or process or to exercise direct revisionary power, is not likely often to be insisted upon. There is great danger to the fundamental rights of the individual in revisionary action by direct popular vote, or even by a special tribunal or a special form of legislative action. The people of the United States are fully alive to these dangers, and there seems to be every probability that our system will never be essentially changed, and that such changes as are made will be for the purpose of rendering it more perfect.

It follows from the American philosophy of government that we regard all our organized communities—even the United States and the States—as corporations. The citizens of the State or of the nation are the members of the corporation, and the government is a governing agency or governing board. The object of all government, as we view it, is to secure the fundamental rights of the individual, and the powers of governments are limited to this purpose. Every organized community is, by virtue of the fact that it is a corporation, democratic and representative. Corporations may of course form themselves into a corporation and frequently do so when the operations are widely extended—the greater corporation so created being given superintending power for the

general purposes. We apply this same idea, and our States as corporations have formed themselves into a federal corporation or federal nation. Thus the American philosophy of government necessarily results in democratic, representative and federal institutions.

The fact that some of the peoples of the world are beginning to hold a philosophy of government which distinguishes between fundamental rights and artificial rights, has already had a profound effect upon international relations and is likely to have still greater effects; for out of the acceptance of the belief in fundamental rights grows the belief in the rights of individuals against governments, and of the propriety and necessity of constitutional prohibitions imposed by peoples or by society at large upon governments, for the protection of these rights. The individual thus becomes a subject of the public international law, as well as the nations. The old theory that international law, or the law of nations, was concerned solely with the rights of nations is already modified. We look at the real parties in interest, and discover that in an increasing number of cases an individual or a group or class of individuals is the real party on one side and a nation as a corporation the real party on the other. Individuals who are sojourning in a foreign nation often come into direct conflict with the government of the nation; and individual citizens of one nation frequently make contracts with a foreign nation. Thus the question arises in various ways, what rights have citizens of one nation against another nation?

Some European writers on public international law have already noticed the change which is taking place in the views held concerning the subjects of international law growing out of the increasing belief in the fundamental rights of the individual—the rights of man, as the French call them. Thus in the *Manual de Droit International Public*, by Bonfils, revised by Fauchille,[7] it is said:

> The nations, considered as members of the international community, are *par excellence* international persons. * * * But are they the only international persons? Yes, if one uses the expression "international persons" as synonymous with and equivalent to "members of the international community." But if, giving another meaning to this expression, one designates by the term "international persons" all the beings whose juridical situation is regulated by the public international

[7] 6th Ed. 1912, Pars. 154, 157.

law, whose rights and duties are determined and whose privileges are restricted by this law, as subjects of this branch of the law, the nations are not the only international persons.

Speaking of the individual man as one of the subjects of the public international law, these authors say:

Man, as a member of humanity, has an individuality of his own, says Pasquale Fiore, a sphere of action which may include all the regions of the globe, a juridical capacity belonging to him by reason of his mere existence and independent of that which may be recognized as pertaining to him as a citizen of a nation. * * * Heffter classes among the immediate subjects of international law man considered by himself, and the citizens of a nation in their relations with other nations. He develops his thesis by examining the primordial rights of man, of which the idea of personal liberty is the foundation, and which are not to be confounded with political or civil rights. * * *

Undoubtedly the individual man is not an international person of the same kind as the nations. Among other differences, there is one which is very marked: From the point of view of international law, the nation has a simple character, in that it is and can be subject only to international law. The individual man, however, has a composite and mixed character, in that he is, at one and the same time, subject to international law, and to the particular law, public and private, of his own nation. These two qualities exercise on each other a reflex influence. To refuse to regard the individual man as an individual person, is to sacrifice the first to the second.

Has not every man certain fundamental rights? Without regard to the nationality of the individual, are not the inviolability of the human person as against the slave trade, the security of private property as against piracy, now placed under the protection of international law?

These same writers have this to say regarding the rights of individuals, as citizens of a nation, against another nation:

Moreover, each individual, however isolated, has everywhere, as a native of a particular nation or as under its jurisdiction, certain rights based on the principles of international law. The violation of these rights is an injury, not only to the individual, but to the nation of which he is a citizen. The subject of the rights of the native inhabitants against a foreign conqueror, of the rights of foreigners to enjoy special rights against uncivilized natives, the subject of naturalization, and of emigration, fall within the jurisdiction, in varying degrees, both of international law and of national law. Do not disputes and conflicts arise between nations regarding emigration and naturalization? Is not the matter of the extradition of criminals, though it so profoundly concerns the individuals charged with crime, essentially a matter of public inter-

national law? In these cases, and in many others, the citizen of a nation finds himself in contact, in relationship or in conflict, not with the subjects of another nation, but with the nation itself. It is as respects this nation, as an international person, that the relationship must be determined, or the dispute settled. This relationship or this dispute is of an international kind and is subject to be determined by international law, just as analogous relationships or disputes arising between a nation and one of its own citizens are determined by the national law.

It is important to distinguish, as these writers do, between the claims of individuals against a foreign government based on violation by the foreign government of the fundamental rights of the individual and the claims of individuals against a foreign government based on violation by the foreign government of the rights which the individual has as a citizen of his own nation. The Constitution of the United States distinguishes between the two classes of cases. The Supreme Court of the United States has jurisdiction of all cases involving the fundamental rights of the individual (the Fourteenth Amendment having made the United States the guardian of fundamental rights against infringement by the States), regardless of whether the complainant is a citizen of the United States, or of the State of which he complains, or whether he is a foreigner. He claims these rights simply as a human being, and not as a citizen of the United States or of a State. In cases not involving fundamental rights, arising between a State and citizens of another State or between citizens of different States, or between a State, or the citizens thereof, and foreign states, citizens or subjects, the Supreme Court has jurisdiction by virtue of the citizenship of the parties. In this class of cases, the individual has rights only as a citizen of a State.

The truth seems to be that when an individual claims that his fundamental rights have been infringed by a government, whether the government is his own or a foreign one, he appeals neither to international law nor to national law, but to a law which is supreme over all peoples and all nations, and which grows out of our common human nature and the nature of human society. This law no people or nation can "create"; it can only "recognize" it. As respects rights that are not fundamental,—that is, which are artificial or remedial, each individual is subject to the rules of international law or of national law according to the nature of the case and according to the citizenship of the parties.

But as respects his fundamental rights, each individual and each government is subject to the rules of the fundamental and universal law which is supreme over both international and national law, and is pervasive throughout the whole society of peoples and nations regardless of national limits. Though the American people have in fact secured the fundamental rights of the individual by our own national law, through constitutional prohibitions, we do not regard these fundamental rights as created either by our own national law or by international law, but by a law universally pervasive and supreme over both, which we "recognize," and which we consider that we must recognize on penalty of reversion to barbarism. One may adopt the religious hypothesis and call this supreme universal law the law of God, or the philosophical hypothesis and call it the law of nature, or the juridical hypothesis and call it the law of human society. Perhaps the simplest way out of the difficulty of determining the source of this law is to regard it as a law made by human society as an organized unitary community, and to call it "the fundamental law," understanding by this that law which is supreme over all other human law, whether international, national or municipal, and which deals directly with the rights of the individual man as a human being as against all human society. As Bonfils and Fauchille say, slavery is abolished everywhere because society in general feels that it is in violation of the fundamental rights of the individual merely as a human being regardless of his citizenship, and hence destructive of all human society. That there are rights of the individual which he has merely as a human being and which follow him throughout the world, is proved by the fact that each enlightened human being, if he searches his own conscience, finds himself compelled so to believe. The existence of this law cannot be proved by ordinary methods of proof. It must be accepted as an axiomatic and self-evident truth.

The supremacy which the American people attribute to the fundamental law is what may be called a limited supremacy—a supremacy within a certain definite sphere. Just as the Constitution and laws and treaties of the United States are not supreme over the Constitutions and laws of the States for all purposes, but only for certain purposes which are in fact the general purposes of the Union, so the American people must necessarily believe that the public international law is supreme

only for the general purposes of the whole international society over national constitutions and laws; and so also they must necessarily believe the fundamental law is supreme over the public international law and all national constitutions and laws only for the still more general purpose of securing those fundamental rights of the individual which attach to him merely as a human being and not as a citizen of the international community or of a particular nation. Thus, according to the American view, there are four kinds of supreme law, but the supremacy of each is within a certain sphere. There are certain activities and relationships of an individual which are necessary to him as a human being equally with all other human beings. Questions concerning his rights to these activities and relationships, whether the rights are claimed against individuals or against the government, are to be determined according to the principles of the fundamental law. There are other activities and relationships which each individual claims and enjoys as a citizen of a nation in or against another nation or its citizens. These rights are determined by international law. There are still other rights which the individual claims and enjoys as a citizen of a particular nation within the nation. These rights are to be determined by the law of the nation of which he is a citizen. In federal states, there are rights which the citizen of a state enjoys within a state and which are exclusively determined by the law of the state. At present the old rule which made all governmental action of cities and towns legally subordinate to the governmental action of the state applies, but there are signs that there is arising a conception of certain rights which a citizen enjoys as a citizen of the city or town. The courts within the United States actually apply these principles as a matter of course in their decision of cases. If, under the facts of the particular case and the issues formed in the case, the fundamental rights of the individual are involved, the constitutional prohibitions for the security of fundamental rights are applied. If, under the facts and issues, the rights of the individual as a citizen of a nation in or against a foreign nation, or as a citizen of a foreign nation against the nation or a State, are involved, the case is decided by international law; if the rights of the individual as a citizen of a State against another State or of citizens of one State against citizens of another are involved, the case is determined by the law of the United States; if the

rights of the individual as a citizen of a State within the State are involved, the case is determined by State law.

This hierarchy of laws springs, as has been seen, from a hierarchy of communities. At the top stands all human society regarded as a single corporate unit, which is the theoretical legislator of the fundamental law under which each individual has certain rights against all other individuals and all governments, simply as a human being belonging to this society by reason of his creation as a human being. Next comes the federalistic organization composed of all the nations of the world—or all the civilized nations—regarded as a consociation of nations. This consociation is the legislator of international law or the law of the society of nations, under which each citizen of a nation has certain rights against other nations and their citizens, and rights in the high seas and other property common to all the nations. Next come the particular nations, each of which is the legislator of its national law under which each citizen of the nation has certain rights within the nation. In federal states, the nation is the legislator of the national law and the State of the State law, and each citizen of a State has certain rights under State law within the State, different from his rights as a citizen of the nation.

The doctrine of fundamental rights has, however, no more necessary connection with the idea of the federal state or nation than with that of the unitary state or nation. It is equally necessary for the people of a unitary nation, as for those of a federal one, to recognize the fundamental law and to protect the fundamental rights of the individual against all other individuals and against all governments by constitutional prohibitions against certain forms of governmental action. This is evidenced in the United States by the fact that the people of the States impose the same prohibitions upon their State governments that the people of the United States impose upon the Federal Government. It is probably equally true that the idea of a federal state or nation gives rise to the idea of a fundamental law of human society as a whole and of fundamental rights under this law, and that the idea of fundamental rights under a fundamental law made by human society as a whole gives rise to the idea of a federal state or nation. But it is also true that a people may have an idea of a universal society, of fundamental law and

of fundamental rights, without having any experience of a federal state or nation, and even though they believe in the unitary rather than the federal form of organization. France, with its idea of the rights of man, and Great Britain with its idea of fundamental rights derived from the constitutional prohibitions upon certain forms of governmental action found by experience to be dangerous or destructive to these rights, show that the conception of a fundamental law and fundamental rights has no necessary connection with the federal form of government. The constitutional prohibitions adopted by the people of the United States in the Constitutional Bill of Rights are in fact collated from Magna Charta, from the English Petition of Right, from the English Habeas Corpus Act, and from the English Bill of Rights, as these were developed in the Massachusetts Body of Liberties, in the Virginia Declaration of Rights and in the original Constitutions of the States of the American Union.

The real difference between the United States and other nations is thus not so much one of the philosophy of government, as of the system which we apply to make the fundamental law and the fundamental rights of the individual practical and effective. No other nation imposes constitutional prohibitions for the protection of these rights upon all its governments and all their branches and makes these prohibitions the most fundamental part of the supreme law of the land so as to make the courts the guardians of these fundamental rights. Though we may believe that this system is not perfect, it has the tremendous advantage of keeping the conception of fundamental law and fundamental rights alive in the minds and consciences of the people. The knowledge that the most insignificant individual may call to his aid the protection of the courts against the acts of his State legislature and even against the acts of the national Congress if these acts violate these fundamental constitutional prohibitions, dignifies the individual and keeps before the mind of all the people the moral worth of each human being simply as a human being, a creation of God, and a member of human society. It dignifies government by enabling the people to regard it in its proper aspect as an agency of the people having for the sole object of its institution the welfare and development of the individual. It compels the public official to exercise his power by judgment, since he is obliged in each case to

decide before he acts whether he is acting within the jurisdiction assigned to him as an agent of the people to secure fundamental rights. There is no particular virtue in written constitutions in so far as they merely determine the frame of organization of the government and the distribution of functions between the different branches of the government and the different corporate members of the nation. Their virtue lies in the possibility of establishing, by means of them, constitutional prohibitions for the protection of the fundamental rights of the individual, and of making these prohibitions the fundamental part of the supreme law of the land. The limitations of power as between the different branches of government and the different corporate members of the nation may be established under unwritten constitutions, but the limitations of the power of a government as between itself and the individual can only be effectively established by a written constitution enacted by the people, in which are inserted constitutional prohibitions for the protection of the fundamental rights, which are by the people declared to be the fundamental part of the supreme law of the land, and which are interpreted and applied by the courts, subject perhaps to revision, in extraordinary cases, by an extraordinary tribunal established for the purpose.

It is because the people of the United States believe that they have a peculiar system of government which is essential not only to their own liberty and their own society, but to individual liberty and human society everywhere, and which they hold in trust for civilization, that they feel it their duty to protect their philosophy and their governmental system from such contact with other systems as might endanger its existence. This was the original basis of the Monroe Doctrine, and still continues to be its true basis. The belief in the fundamental rights of the individual which we hold, destroys all motive for conquest, since the only effect of conquest by us is to place upon us the difficult task of securing the fundamental rights of the individual in the countries annexed. We welcome the independence of nations which accept our philosophy and which honestly recognize the fundamental law and do their utmost to preserve fundamental rights. The rights of intervention in the affairs of the South American Republics, for the purpose of controlling them in the interest of Europe, was claimed in 1823 by the

allied powers of Continental Europe as a logical result of their political philosophy and system. President Monroe declared that "the political system of the allied Powers is essentially different in this respect from that of America" and that "this difference proceeds from that which exists in their respective governments." Asserting that "to the defense of our own system, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, this whole nation is devoted," he concluded that we owed it "to candor, and to the amicable relations existing between the United States and those Powers, to declare that we should consider any attempt on their part to extend their system to any part of this hemisphere as dangerous to our peace and safety."

The whole effect of the Monroe Doctrine was that the American people were determined that their philosophy and their system should have every chance of surviving in the competition of philosophies and systems to which it could reasonably be thought to be entitled. The philosophy of government then prevailing in Continental Europe denied the fundamental rights of the individual and asserted that all rights of men were created by the nation. The republics of Central and South America having established themselves and having nominally accepted the American philosophy of government and to some extent the American system, the United States asserted that the people of these nations should be free to develop themselves, hoping and believing that in the course of time they would fully accept the American philosophy of government and apply it effectively in their national affairs. The Monroe Doctrine is thus a doctrine of freedom. It had its origin in a conflict of philosophies. It had for its purpose the protection of the Central and South American Republics in developing and working out a philosophy and system which they had freely chosen. The Monroe Doctrine will die when nations of the world accept the belief in the fundamental rights of the individual and make these rights practical and effective; for by the acceptance of this belief and by the adoption of a practical system in accordance with this belief, all motive for conquest ceases, and nations will refrain from interfering in the internal affairs of other nations, since intervention will carry with it the heavy responsibility of securing the fundamental rights of the people of the invaded

country, without possibility of great gains, and with only an uncertain compensation.

The fact that the American people hold this philosophy of government in which the securing of the fundamental rights of the individual is regarded as the object for which all government is instituted among men, profoundly affects the attitude which American statesmen must take in respect to every question growing out of our foreign as well as our domestic relations. The officials of our Department of Foreign Affairs—which for historical reasons we call the Department of State—as well as our diplomatic officials, accustomed to regard the fundamental rights of the individual as the matter of prime importance, inevitably and properly apply our own constitutional tests to all proposals for joint action between the United States and any other nation, in the solution of questions arising between this nation and any other. To them the old conception of sovereignty, as a power of each nation to do what it wills, is impossible, since our philosophy compels us to hold that all national action is limited by the fundamental law.

The American philosophy and system of government—or more properly, the failure of other nations to accept our philosophy and system—particularly stands in the way of international arbitration and the judicial settlement of international disputes. With the drawing together of the whole world by the increased facilities for travel and communication, disputes tend more and more to be between an individual and a government or some branch of it. In every case of this kind there is a possibility that the question of the fundamental rights of the individual may be involved, so that in a similar case arising in the United States, the constitutional prohibitions for the protection of fundamental rights would be applied by the courts and the governmental action in question might be nullified. In this class of cases, when the United States is asked to submit to arbitration or judicial settlement, a grave difficulty arises. Inasmuch as the peoples of foreign nations do not impose constitutional prohibitions on their governments for the protection of fundamental rights and do not make these prohibitions the fundamental law of the land, the courts and the lawyers of European countries are not accustomed to issues being raised concerning the validity of acts of government as respects fundamental rights. As it is

necessary that European jurists should be in the majority on most arbitral or judicial tribunals in international cases, it follows that these tribunals are likely to treat some governmental acts as valid which we would hold invalid and nullify as infringing fundamental rights. Thus the United States must, for the protection and preservation of its own philosophy and system, refrain from submitting to the decision of such a tribunal any case which, if arising within the United States, would be considered as involving the fundamental rights of the individual under our constitutional prohibitions. So long as this difference in philosophies and systems continues, the only hope for the extension of international arbitration or judicial settlement would seem to be in making all action of international arbitral or judicial tribunals advisory to the nations which are the parties. This would permit these nations themselves to review the decision from every standpoint and to protect their own philosophies and systems. Acceptance of a decision by the parties would greatly increase its weight as a precedent for other nations, and would insure the execution of the decision by the defeated party.

The American philosophy of government also stands in the way of the codification of international law. No American can, consistently with his own fundamental beliefs, subscribe to a code of international law which does not contain constitutional prohibitions forbidding to all peoples, nations and governments certain forms of action dangerous to or destructive of fundamental rights, and which does not make these constitutional prohibitions fundamental and supreme over all international and national law.

The United States is therefore at the present time in one sense a disturbing factor in the councils of the nations. Its disturbance is not of a physical kind, but of an intellectual and spiritual kind. It brings to the discussion of all international questions ideas of universal law, of fundamental rights of the individual as a created human being, of practical protection of these rights through constitutional prohibitions on all governments, based on popular and national recognition of fundamental law. To some these ideas may seem to be destructive, but they are really in the highest sense conservative and constructive; for the recognition of the rights of man is in no sense inconsistent with the recognition of the rights of nations. The American philosophy equally recog-

nizes the rights of man and the rights of nations, holding that society can exist only through local organization, and that nations acting independently, but in concert, are the most appropriate means of securing the individual in his fundamental rights and in aiding him to extend his powers over nature.

The philosophy of the United States makes for peace. The wars which the United States has fought have all been for the purpose of protecting the fundamental rights of the individual and maintaining the nation as the guardian of these rights. There can be no true peace except where the individual has his fundamental rights, and where these rights are secured to him by the power of a nation. It is unlikely that the United States will ever apply physical force externally in the future except for the same purposes for which it has waged wars in the past. Such protective and defensive action its philosophy permits and in some cases demands.

ALPHEUS HENRY SNOW.

THE CENTRAL AMERICAN QUESTION FROM A EUROPEAN POINT OF VIEW

"Then felt I like
Some watcher of the skies
When a new planet swims into his ken."
Keats.

Oceans have ever been the chief theater of universal history. The terrestrial sphere known to antiquity lay around the Mediterranean which, as its name indicates, was destined to remain the center of events, until the famous sea-heroes, impelled by a desire to explore, undertook bold voyages to distant, unknown regions, and Christopher Columbus finally discovered the Western Hemisphere, bringing it in contact with the considerations, hopes, needs of expansion and, last but not least, also, fears of Europe.

From that moment, in what is termed by the historian as "the modern era," the chain of historical events was gradually carried across the Atlantic Ocean which, as a connecting bond, exerted influence over two parts of the earth and, more than four centuries ago, took the place of the smaller Mediterranean, which had hitherto been the exclusive scene of universal history. "Westward the star of Empire takes its way."

Just as in the Mediterranean the center of gravity was changed in the course of time, even so was the supremacy over the Atlantic hotly contested, until England built up its from pine to palm extending Imperium Britannicum and thus assumed a rôle like unto that of ancient Rome, a comparison which applies even to that Catonian pertinacity with which the Anglo-Saxons went ahead whenever a "Carthago" happened to obstruct their advance.

The proud dictum "Britannia rules the waves" retained all of its

force, until the United States of America and Germany entered the list of sea Powers; and it is a remarkable coincidence that these three kindred nations are commanding the most powerful fleets on earth at the moment when the world is preparing for the opening of the Panama Canal.

By this event our planet's largest body of waters—heretofore so to speak a "mare clausum"—is at last opened up to the competition of all seafaring nations, and vistas are disclosed whose possibilities in the long run may not remain in harmony with the *peaceful* name of this "Pacific" or "Quiet" Ocean. As the "Great Ocean" however, if we are not misinterpreting the signs of the times, it will reflect the significance of the approaching new era.

This new era is with us even now. We are on the threshold of it. The completed transformation of the isthmus from a land-bridge into a gateway, is to be considered as its beginning, the unlocked Great Ocean as its scene of action. How then can we help wondering, when those palm-shaded lands of the tropics—the Central American countries—which forty years ago were hardly more than the pleasure ground of philatelists, are gradually but surely moving into the foreground of universal interest? Is it not because the dawn of the new era is breaking over them?

The reader may possibly deem such assertions to be the bold conjectures or merely the vaporings of an officious prophet; but events that are actually taking place in the countries around the Isthmus of Panama, combined with the world-stirring importance of the Canal, seem to the writer to justify his conclusions.

The "Central American Question"—conceived in 1880 on the Isthmus, it may be said, by an urgent need for power and intercourse—was so slow of birth that its appearance was scarcely noticed by the world at large. Not many there are who are conscious of its existence; and even under the Star-Spangled Banner, the far-seeing thinkers who give this serious question their attention number but few.

But this is characteristic of the United States. The average American is self-centered; he knows only his own land; he lives exclusively for his personal interests and understands foreign affairs but little; however, his national pride is easily roused, and all reflection cast upon

it is deeply resented. And there is this other fact: the American press does not represent a very high grade of literature; its columns have quantity of material; the material itself lacks quality; yet the average reader's information is gotten from it, and his political views are shaped by it. The better kind of monthly reviews have only a comparatively small circulation by reason of their higher cost.

And so it happens that in the United States, which is most deeply affected by it, the "Central American Question" has not as yet made its impression upon public opinion; the word even has not as yet been coined nor its meaning been taken to heart. Consequently this country and also Europe look upon the situation in Mexico, upon the Panama Canal, upon the Caribbean Sea with its islands and its littorals, as well as upon all matters that have taken place within those domains and with regard to them, from separated viewpoints, when in fact these matters should be studied from the same angle all over the world.

Any other attitude would be a grievous mistake, for we must stop and think that the Panama Canal, especially in these times, is nothing to the Union except a mighty defensive and offensive weapon, the effective handling of which demands a strong arm with an iron hand. But the mere possession of the weapon does not suffice. It must, in accordance with the requirements of the times, be kept in proper usable form and always be within immediate reach of its owner.

It is for these reasons that almost all the incidents that for a long time have taken place in the northern hot zone of the western hemisphere, or incidents that affect those regions only slightly, are directly connected with the Panama Canal, which thus becomes the pivot of the whole Central American question. Not to repeat what has often been stated before, we must take it for granted that the reader looks upon the Panama Canal as mainly a factor of military power.

But we think also of this Panama Canal, with its two harbors, its dock-yards, depots and coaling stations, as an important rallying place for fleets, where not only men-of-war, but also merchant ships, may undergo repairs and take fuel on board. With particular reference to the latter, the American Government has come to realize that it might

just as well wring from the costly waterway a profitable revenue derived from the sale of fuel to the passing vessels. With an estimated annual traffic of between ten and twelve million tons to begin with, the sale of coal would in the long run rise to profitable proportions.

But owing to the genius of *Diesel*, a change was wrought in the construction of machinery which will dethrone King Coal, and lead to the advent of petroleum, which has already taken the place of coal on a large number of vessels of the American, British and other navies. In due course of time, freight and passenger steamers will adopt the same system. And as soon as a petroleum engine, adaptable to the largest vessels, shall have been perfected, then the coal-burning ship will be relegated to the past, just as were the superb sailing-vessels which *Fulton*, a hundred years ago, succeeded in driving off the oceans.

This innovation in the construction of machinery will certainly before long revolutionize ship-building completely: it will also affect crew, cargo, radius of action, speed, naval-stations; it will reduce the time for taking fuel on board; it will, in short, affect the whole realm of naval strategy and deep sea trade. And petroleum, which hitherto has been nothing but an ordinary commercial article, jumps at one bound within the sphere of military and political interests.

It is evident, therefore, that every seafaring nation, and consequently the American nation, will and must give consideration to the world's oil production, but particularly oil-production near the sea coasts, and this for the same reasons that in part compelled them heretofore to look out for coal. The British Government, months ago, announced through *Winston Churchill*, the First Lord of the Admiralty, that it will be the policy of that country to control the world's petroleum sources around important strategic points; and we have in the meantime learned what Great Britain has already done in that direction.

While the world's attention was attracted first by Tripoli, then by the Balkan troubles, and while Europe wrangled about the frontiers of Albania, England went ahead and secured for herself all the oil-concessions she wanted, and when *Mr. Churchill* spoke the main part of that work was already completed. Great Britain once more lived up to her farsighted policy because petroleum near the coasts and whenever

possible near harbors is the watchword of the times! For the nearer oil fields are to the harbors, the more valuable they will be to the owner of the harbor, who will make every effort to get possession of them, exploit them, and conduct the oil through pipe-lines to the wharves where it will be taken as cargo on board tank-steamers; or in the form of a new elixir of life, it will in double-quick time find its way into the fuel compartments of the ships which, up to the present time, wasted days in the unclean and difficult work of coaling.

It is quite evident, therefore, that tne owner of the oil wells will also control the harbors situated in their neighborhood; for at his pleasure he can limit the sale of the product and dictate the price. Whoever has lawfully acquired title to such an advantageous position will not allow himself to be crowded out, not even by the owner of the harbor.

By applying these considerations to the Panama Canal, the existence of large petroleum fields within or near the Canal Zone would be an ideal state of affairs. For instance, the oil would in that case be brought on board ships in need of it while they were passing through the locks. It would, therefore, be a matter of paramount concern to the American Government to own those imaginary oil fields, and any efforts made to that end would be considered as natural and justified.

While, however, up to the present time, no petroleum has been discovered on the Isthmus, and the geological formation of the land does not point to its presence there, yet a glance at the accompanying map of oil-fields shows that it has pleased Providence to bless countries neighboring upon the important waterway with that inestimably valuable product of nature. Indeed it seems almost wonderful, when we realize that the hand of the Creator has in this particular case anticipated the creative impulse of the engineer and the inventive spirit of the technical man.

This fact becomes even clearer, when we consider the oil production of the world which is shown in the following comparative tables, remembering at the same time that the oil can be pumped through pipe-lines extending over many miles of territory, from its source to the place where it is to be used.

WORLD'S PRODUCTION OF CRUDE PETROLEUM, 1905–1909, BY COUNTRIES[1]

[Barrels of 42 gallons]

Country	1905	1906	1907	1908	1909			
					Rank	Barrels	Metric tons	Per cent of total production
United States	134,717,580	126,493,936	166,095,335	178,527,355	1	182,134,274	24,284,570	61.24
Russia	54,960,270	58,897,311	61,850,734	62,186,447	2	65,970,350	8,796,047	22.19
Galicia	5,765,317	5,467,967	8,455,841	12,612,295	3	14,932,799	2,076,740	5.02
Dutch East Indies	7,849,896	8,180,657	9,982,597	10,283,357	4	11,041,852	1,474,751	3.71
Roumania	4,420,987	6,378,184	8,118,207	8,252,157	5	9,321,138	1,296,403	3.13
India	4,137,098	4,015,803	4,344,162	5,047,038	6	6,676,517	890,202	2.24
Mexico	.....	.....	1,000,000	3,481,410	7	2,488,742	331,832	.84
Japan *a*	1,472,804	1,710,768	2,010,639	2,070,929	8	2,012,409	268,321	.68
Peru	447,880	536,294	756,226	1,011,180	9	1,316,118	175,482	.44
Germany	560,963	578,610	756,631	1,009,278	10	1,018,837	143,244	.34
Canada	634,095	569,753	788,872	527,987	11	420,755	56,101	.14
Italy	44,027	53,577	59,875	50,966	12	*b* 50,000	*b* 6,954	.03
Other	*b* 30,000	*b* 30,000	*b* 30,000	*b* 30,000	13	*b* 30,000	*b* 4,000	
Total	215,040,917	212,912,860	264,249,119	285,090,399	.....	297,413,791	39,804,647	100.00

a Including Formosa, except in 1905. *b* Estimated.

WORLD'S PRODUCTION OF CRUDE PETROLEUM, 1908–1912, BY COUNTRIES, IN BARRELS AND METRIC TONS[2]

Country	1908	1909	1910	1911	1912			
					Rank	Barrels	Metric tons	Percentage of total production
United States	178,527,355	183,170,874	209,557,248	220,449,391	1	222,113,218	29,615,096	63.25
Russia	62,186,447	65,970,350	70,336,574	66,183,691	2	68,019,208	9,317,700	19.37
Mexico	3,481,410	2,488,742	3,332,807	14,051,643	3	16,558,215	2,207,762	4.71
Dutch East Indies	10,283,357	11,041,852	11,030,620	12,172,949	5	10,845,624	1,478,132	3.09
Roumania	8,252,157	9,327,278	9,723,806	11,107,450	4	12,991,913	1,806,942	3.70
Galicia	12,612,295	14,932,799	12,673,688	10,519,270	6	8,535,174	1,187,007	2.43
India	5,047,038	6,676,517	6,137,990	6,451,203	7	7,116,672	989,801	2.03
Japan	2,070,145	1,889,563	1,930,661	1,658,903	9	1,671,405	222,854	.48
Peru	1,011,180	1,316,118	1,330,105	1,368,274	8	1,751,143	233,486	.50
Germany	1,009,278	1,018,837	1,032,522	1,017,045	10	995,764	*a* 140,000	.28
Canada	527,987	420,755	315,895	291,096	11	243,614	32,612	.07
Italy	50,966	42,388	42,388	74,709	12	*a* 86,286	*a* 12,000	.02
Other	*a* 30,000	*a* 30,000	*a* 30,000	*a* 200,000	.....	250,000	33,333	.07
Total	285,089,615	298,326,073	327,474,304	345,512,185	.....	351,178,236	47,276,725	100.00

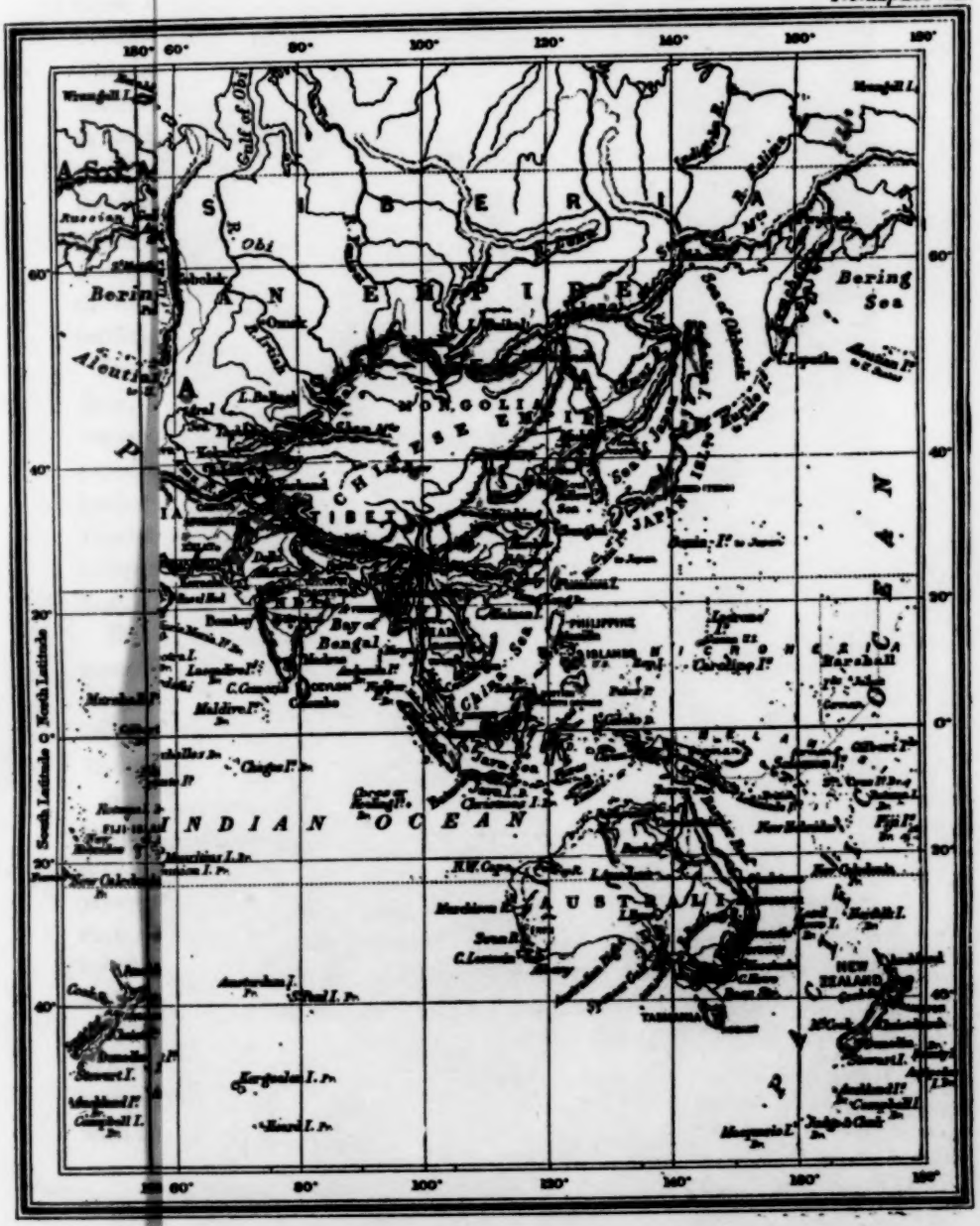
a Estimated.

According to these statistics, Mexico as an oil producing country has leaped within the last three years from seventh to third position; and in spite of continuous disturbances going on there, the probable exports of the product in 1913 are estimated to have risen to 24,000,000 barrels (1 barrel = about 1½ hectoliters).

[1] Reprinted from "The Production of Petroleum in 1909," by David T. Day, U. S. Geological Survey, p. 113.

[2] *Ibid.*, 1912, p. 137.

Frontispiece Vol.I.


INDIAN OCEAN
Bering Sea
Bay of Bengal
Gulf of Obi
Obi R.
Behring
Aleutian
Russian
Gulf of Tartary
Sea of Japan
Yellow Sea
China Sea
Coral Sea
Arafura Sea
Timor Sea
Gulf of Carpentaria
Great Australian Bight
Tasmania
NEW ZEALAND
PHILIPPINE
Marshall I.
Maldive I.
Chagos I.
Mauritius I.
New Caledonia
Fiji Is.
Amsterdam I.
Kerguelen I.
Campbell I.
Auckland Is.
Macquarie I.
Bounty Is.
Antipodes Is.
Norfolk I.
Lord Howe I.
Solomon Is.
Admiralty Is.
Pelew Is.
Ladrone Is.
Caroline Is.
Marianne Is.
Sandwich Is.
Society Is.
Friendly Is.
Low Archipelago
Marquesas Is.
Pitcairn I.
Easter I.
Juan Fernandez
Galapagos Is.
Tristan da Cunha
Gough I.
St. Paul I.
Christmas I.
Cocos I.
Keeling I.
Rodriguez I.
Comoro Is.
Seychelles Is.
Amirante Is.
Cargados Is.
Diego Garcia
Kerguelen I.
Heard I.
Macdonald I.
Wrangell I.
Behring Str.
Kamtschatka
Okhotsk
Yakutsk
Irkutsk
Lena R.
Yenisei R.
Obi R.
Irtish R.
Ural R.
Caspian Sea
Aral Sea
Black Sea
Baltic Sea
Persian Gulf
Red Sea
Mediterranean
Gibraltar
Madeira Is.
Canary Is.
Cape Verde Is.
Azores
Iceland
Greenland
Hudson Bay
Baffin Bay
Davis Str.
Labrador
Newfoundland
Nova Scotia
Bermuda Is.
Florida
Mexico
Gulf of Mexico
Yucatan
Panama
Cuba
Jamaica
Hayti
Trinidad
Guiana
Brazil
Cape Horn
Falkland Is.
Patagonia
Chile
Peru
Ecuador
Columbia
Venezuela
Amazon R.
La Plata R.
Rio Grande
Mississippi R.
Missouri R.
Ohio R.
Hudson R.
St. Lawrence R.
Great Lakes
Rocky Mts.
Alleghanies
Sierra Nevada
Andes
Himalaya Mts.
Ural Mts.
Caucasus
Alps
Pyrenees
Apennines
Atlas Mts.
Abyssinia
Nubia
Egypt
Nile R.
Niger R.
Senegal R.
Gambia R.
Guinea
Sierra Leone
Liberia
Ivory Coast
Gold Coast
Dahomey
Benin
Cameroons
Gaboon
Congo R.
Angola
Benguela
Cape Colony
Natal
Zambesi R.
Mozambique
Madagascar
Zanzibar
Somali Coast
Arabia
Persia
Afghanistan
Beloochistan
Scinde
Punjaub
Cashmere
Thibet
Nepaul
Bhotan
Assam
Burmah
Siam
Cochin China
Tonquin
Malacca
Sumatra
Java
Borneo
Celebes
Moluccas
New Guinea
Australia
Victoria
New South Wales
Queensland
South Australia
Western Australia
Port Darwin
Port Jackson
Melbourne
Adelaide
Perth
Swan R.
Murray R.
Darling R.
Lake Eyre
Lake Torrens
Lake Amadeus
Lake Gregory
Lake Macleod
Lake Austin
Lake Barlee
Lake Lefroy
Lake Moore
Lake Dundas
Lake Hope
Lake Gairdner
Lake Frome
Lake Callabonna
Lake Blanche
Lake Hope
Lake Torrens
Lake Eyre

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It is evident, therefore, that every seafaring nation, and consequently the American nation, will and must give consideration to the world's oil production, but particularly oil-production near the sea coasts, and this for the same reasons that in part compelled them heretofore to look out for coal. The British Government, months ago, announced through *Winston Churchill*, the First Lord of the Admiralty, that it will be the policy of that country to control the world's petroleum sources around important strategic points; and we have in the meantime learned what Great Britain has already done in that direction.

While the world's attention was attracted first by Tripoli, then by the Balkan troubles, and while Europe wrangled about the frontiers of Albania, England went ahead and secured for herself all the oil-concessions she wanted, and when *Mr. Churchill* spoke the main part of that work was already completed. Great Britain once more lived up to her farsighted policy because petroleum near the coasts and whenever

possible near harbors is the watchword of the times! For the nearer oil fields are to the harbors, the more valuable they will be to the owner of the harbor, who will make every effort to get possession of them, exploit them, and conduct the oil through pipe-lines to the wharves where it will be taken as cargo on board tank-steamers; or in the form of a new elixir of life, it will in double-quick time find its way into the fuel compartments of the ships which, up to the present time, wasted days in the unclean and difficult work of coaling.

It is quite evident, therefore, that tne owner of the oil wells will also control the harbors situated in their neighborhood; for at his pleasure he can limit the sale of the product and dictate the price. Whoever has lawfully acquired title to such an advantageous position will not allow himself to be crowded out, not even by the owner of the harbor.

By applying these considerations to the Panama Canal, the existence of large petroleum fields within or near the Canal Zone would be an ideal state of affairs. For instance, the oil would in that case be brought on board ships in need of it while they were passing through the locks. It would, therefore, be a matter of paramount concern to the American Government to own those imaginary oil fields, and any efforts made to that end would be considered as natural and justified.

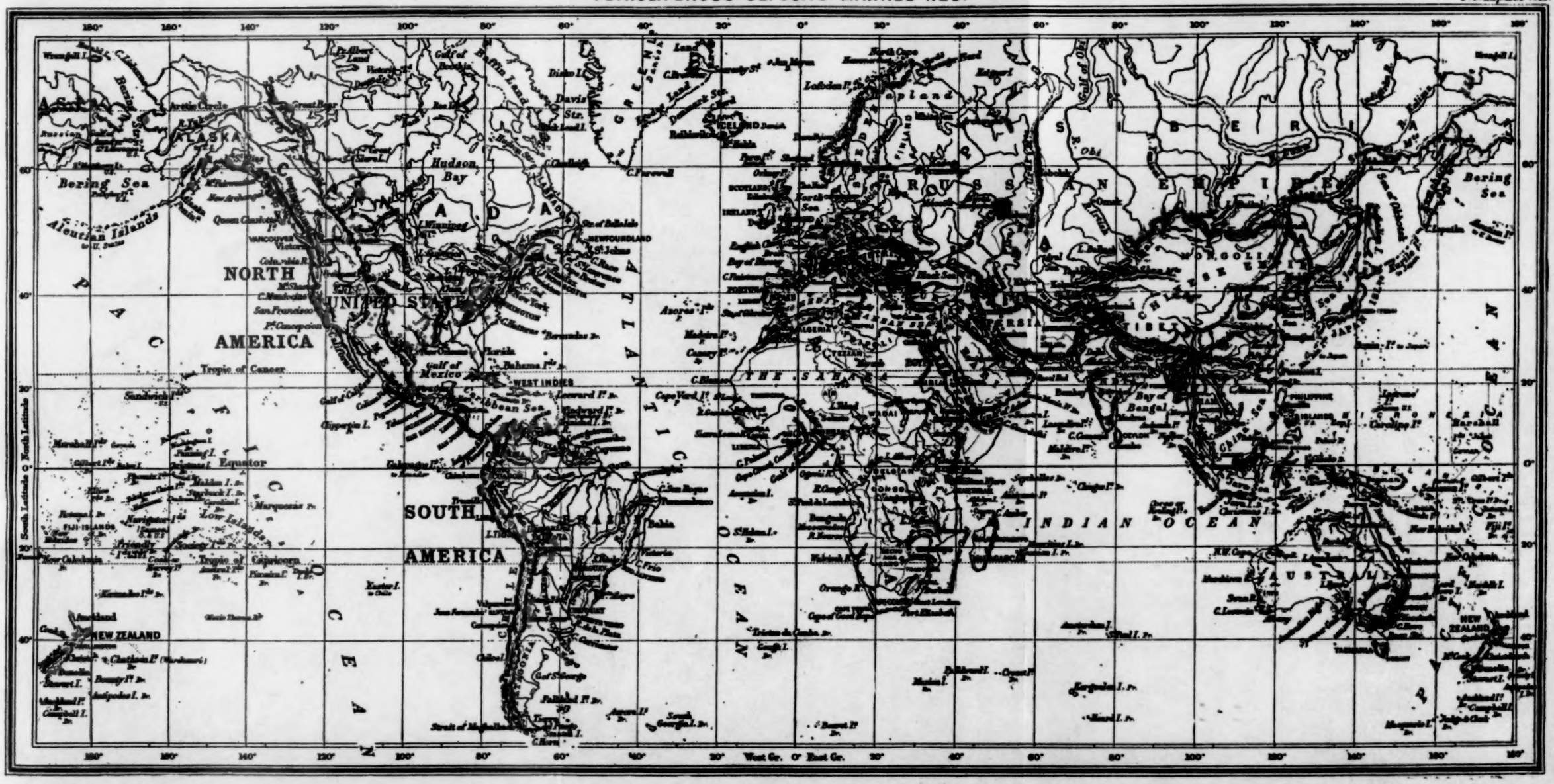
While, however, up to the present time, no petroleum has been discovered on the Isthmus, and the geological formation of the land does not point to its presence there, yet a glance at the accompanying map of oil-fields shows that it has pleased Providence to bless countries neighboring upon the important waterway with that inestimably valuable product of nature. Indeed it seems almost wonderful, when we realize that the hand of the Creator has in this particular case anticipated the creative impulse of the engineer and the inventive spirit of the technical man.

This fact becomes even clearer, when we consider the oil production of the world which is shown in the following comparative tables, remembering at the same time that the oil can be pumped through pipe-lines extending over many miles of territory, from its source to the place where it is to be used.

OIL FIELDS OF THE WORLD

PETROLIFEROUS DEPOSITS MARKED RED.

Frontispiece Vol.I.



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WORLD'S PRODUCTION OF CRUDE PETROLEUM, 1905–1909, BY COUNTRIES[1]

[Barrels of 42 gallons]

Country	1905	1906	1907	1908	1909			
					Rank	Barrels	Metric tons	Per cent of total production
United States	134,717,580	126,493,936	166,095,335	178,527,355	1	182,134,274	24,284,570	61.24
Russia	54,960,270	58,897,311	61,850,734	62,186,447	2	65,970,350	8,796,047	22.19
Galicia	5,765,317	5,467,967	8,455,841	12,612,295	3	14,932,799	2,076,740	5.02
Dutch East Indies	7,849,896	8,180,657	9,982,597	10,283,357	4	11,041,852	1,474,751	3.71
Roumania	4,420,987	6,378,184	8,118,207	8,252,157	5	9,321,138	1,296,403	3.13
India	4,137,098	4,015,803	4,344,162	5,047,038	6	6,676,517	890,202	2.24
Mexico	.....	.....	1,000,000	3,481,410	7	2,488,742	331,832	.84
Japan *a*	1,472,804	1,710,768	2,010,639	2,070,929	8	2,012,409	268,321	.68
Peru	447,880	536,294	756,226	1,011,180	9	1,316,118	175,482	.44
Germany	560,963	578,610	756,631	1,009,278	10	1,018,837	143,244	.34
Canada	634,095	569,753	788,872	527,987	11	420,755	56,101	.14
Italy	44,027	53,577	59,875	50,966	12	*b* 50,000	*b* 6,954	.03
Other	*b* 30,000	*b* 30,000	*b* 30,000	*b* 30,000	13	*b* 30,000	*b* 4,000	
Total	215,040,917	212,912,860	264,249,119	285,090,399	.....	297,413,791	39,804,647	100.00

a Including Formosa, except in 1905. *b* Estimated.

WORLD'S PRODUCTION OF CRUDE PETROLEUM, 1908–1912, BY COUNTRIES, IN BARRELS AND METRIC TONS[2]

Country	1908	1909	1910	1911	1912			
					Rank	Barrels	Metric tons	Percentage of total production
United States	178,527,355	183,170,874	209,557,248	220,449,391	1	222,113,218	29,615,096	63.25
Russia	62,186,447	65,970,350	70,336,574	66,183,691	2	68,019,208	9,317,700	19.37
Mexico	3,481,410	2,488,742	3,332,807	14,051,643	3	16,558,215	2,207,762	4.71
Dutch East Indies	10,283,357	11,041,852	11,030,620	12,172,949	5	10,845,624	1,478,132	3.09
Roumania	8,252,157	9,327,278	9,723,806	11,107,450	4	12,991,913	1,806,942	3.70
Galicia	12,612,295	14,932,799	12,673,688	10,519,270	6	8,535,174	1,187,007	2.43
India	5,047,038	6,676,517	6,137,990	6,451,203	7	7,116,672	989,801	2.03
Japan	2,070,145	1,889,563	1,930,661	1,658,903	9	1,671,405	222,854	.48
Peru	1,011,180	1,316,118	1,330,105	1,368,274	8	1,751,143	233,486	.50
Germany	1,009,278	1,018,837	1,032,522	1,017,045	10	995,764	*a* 140,000	.28
Canada	527,987	420,755	315,895	291,096	11	243,614	32,612	.07
Italy	50,966	42,388	42,388	74,709	12	*a* 86,286	*a* 12,000	.02
Other	*a* 30,000	*a* 30,000	*a* 30,000	*a* 200,000	.....	250,000	33,333	.07
Total	285,089,615	298,326,073	327,474,304	345,512,185	.....	351,178,236	47,276,725	100.00

a Estimated.

According to these statistics, Mexico as an oil producing country has leaped within the last three years from seventh to third position; and in spite of continuous disturbances going on there, the probable exports of the product in 1913 are estimated to have risen to 24,000,000 barrels (1 barrel = about 1½ hectoliters).

[1] Reprinted from "The Production of Petroleum in 1909," by David T. Day, U. S. Geological Survey, p. 113.

[2] *Ibid.*, 1912, p. 137.

Exports are of course dependent upon transportation facilities, and as these facilities readily increase, exports will increase correspondingly, because the abundance of oil in Mexico seems practically unlimited. This becomes evident from the fact that, not to speak of any other oil-fields the English Pearson interests, whose main oil sources are situated in the State of Vera Cruz and on the Isthmus of Tehuantepec—exclusive of 63 other still unoperated wells—can develop annually, through their flowing wells, an output exceeding one hundred million barrels, that is to say, nearly half of the annual production of the United States. But this possible output and the capacity of the unoperated English Syndicate's wells is at present held under pressure until after transportation facilities have been fully developed.

In these facilities we include the pipe-lines already referred to; it is clear, therefore, that a Mexican oil king can dispense with ships for the transportation of oil, if—which is quite feasible—he connects his wells by pipe-lines with the Panama Canal itself or with a Central American harbor in the neighborhood of that waterway. But even this is not absolutely necessary, for he has the advantage over North American oil by reason both of his nearness to the Canal and of cheaper transportation.

For these reasons, the English firm above referred to, which has recently adopted the name Mexican Standard Oil Company, does not only systematically perfect its net of ducts, but is now engaged in doubling its line of tank-steamers, which numbers already twenty ships of 10,000 tons each.

According to the reports of geologists, Mexico may within a few years advance to the first position as a petroleum-producing country; this explains why it is that England and the United States have for some years—in consideration of the Panama Canal—been contending with each other to secure oil concessions, a fact which is set into strong light by the proportionate investments. Mexican oil interests amount to $175,000,000; England participates in these investments to the extent of $75,000,000; the United States $97,500,000 and Mexico $2,500,000. Whenever geologists trace new oil, concession seekers appear, and the energetic Lord Cowdray, owner of the Pearson firm, so closely connected with the British Admiralty, is always on the spot.

The same conditions apply to Colombia [3] and to Ecuador, where the English seem to have gotten in ahead of the Americans, as well as to Venezuela and Trinidad where, however, their positions are reversed. In short, petroleum, which seemed to be a gift of the gods to the economically weak Latin republics of Central America and of the neighboring countries of South America, has, on account of the Panama Canal, become the bone of contention of the great Powers, which circumstance alone would justify us in speaking of a "Central American Question."

It possesses the elements of serious complications in which, for reasons pointed out elsewhere, Japan may have a hand. The way in which Japan has allowed the recent Californian question to drag calls to mind the old proverb "Forbearance is no acquittance"; and it is quite possible that American intervention in Mexico may in due course of time offer Japan the opportunity that may seem propitious to her for suddenly taking a defiant attitude on that question, which might lead to immeasurable consequences.

Time and space do not permit us to consider carefully the resulting possibilities in the field of world politics. Reference to them should suffice to give the reader an idea of a situation which becomes even clearer by adapting its elements to European conditions.

Let us suppose that, all other conditions being the same, the Kiel Canal were the Panama Canal, and an insurgent Holstein, rich in oil fields, stood for Mexico, Germany for the United States, Russia for Japan, England for England, and an anti-German Scandinavia for Latin America, which is more or less hostile to the United States. The comparison limps, as all comparisons do; but on a smaller scale it shows the difficulties with which the United States is beset, if in future it does not perfect its position as a world Power; or if it does not renounce the Monroe Doctrine; or if, inadequately prepared for action, it permits of its being kept constantly on the defensive.

The well-known disagreement between Great Britain and the United States on account of the interpretation of the Hay-Pauncefote Treaty, in the matter of canal tolls, forms another perplexing circumstance; and the

[3] According to newspaper reports, the English concessionaires, Lord Cowdray of the firm of Pearson & Sons, and Lord Murray of Elibank, withdrew from Colombia about the end of November last. Authoritative confirmation of this news is lacking.

further fact that England is still the ally of Japan cannot well have a comforting effect upon the American mind.

But at the present moment, the pregnant side of the question is Mexico, where, according to the readily understood wishes of the Americans, a government, amenable to these wishes, must be set up, that shall put a limit, among other things, to the European, hitherto only English, thirst for oil. Rent by rebellions for the last three years, that unhappy country is in immediate need of peace; and this can be accomplished only through a man, after the pattern and possessing the qualities of Porfirio Diaz. If such a man—like Huerta, who has publicly expressed himself in favor of an understanding with Japan and England [4]—does not submit to the will of the United States, they will oppose him with all means at their command; if, on the other hand, he complies with their wishes, he will constantly be fought from within Mexico itself, which is hostile to the Union. It seems, therefore, that soon there will be nothing left for the United States to do, except to step in and restore peace in its own way; and as in the case of Cuba, to take temporarily the reins of the government into its own hands. But in view of the friction existing between England, Japan and Latin America on the one hand, and the United States on the other, it can readily be seen that such a decision would not be without its difficulties.

On the other hand, it is quite evident that sooner or later Europe will feel the retroactive force of the Central American Question. The relations between Germany and England are indirectly affected by this question. As long as England looks with distrust upon the increasing strength of the German fleet, it restricts its freedom of action and will not be in a position to secure the complete results of the policy it has pursued hitherto. The well-known maxim "Divide et impera," which has been the immemorial and successful watchword of British diplomacy, was applicable to Europe. But the world, which has in a way been united through the Panama Canal, is no longer an available field for the application of that outworn policy.

From the day of the declaration of the independence of the United

[4] See *Fortnightly Review*, Nov. 1913, p. 857: "One of these days England and Japan and Mexico will go together and after that there will be an end to the United States."

States, America began to shape a world of its own, whose favorable geographical situation made it possible for the Union to remain for nearly a century a disinterested spectator of events that took place in the east and the west. In accordance with this situation, George Washington in his time announced the fundamental principle of not entering into any entangling alliances, and in 1823, President Monroe proclaimed his doctrine [5] as the "noli me tangere" of the young republic, aspiring to leadership on its continent.

But the ever increasing and improving means of communication have brought America into closer economic and cultural relations with the old world; in consequence, it may be said, that with the opening of the Panama Canal, practically the West and the East will clash on the Great Ocean!

The Atlantic Ocean has been the scene of battles and rivalries between *nations*. The Great Ocean which is now coming to the front is likely to become to a far greater extent the scene of action for the struggle of *races*, a fact that may have been foreseen by Senator W. H. Seward when he said as long ago as 1852: "The Pacific Ocean, its shores, its islands and the vast regions beyond will become the chief theater of events in the world's great Hereafter." The "Central American Question," and, above all, the way in which it is to be settled, may consequently prove of the utmost importance for the shaping of all the historical events of the present century, especially if, with reference to the Panama Canal, it is considered as the starting point of a new epoch.

It has been the object of this article to demonstrate the soundness of this view; and for the reasons stated, the writer believes that the time is near when in their political speculations, all Teutonic nations must look upon the world as a whole, and, in accordance with the probable development of things in general, they must begin to think in races and continents.

Nearly two decades ago, the German Emperor uttered words that cannot be forgotten, calling upon the western nations to preserve their most sacred possessions; and each new day the prophetic significance of that utterance becomes clearer. Therefore, all reasonable people should

[5] Reinforced by the Lodge Resolution of 1912, and by the address of President Wilson, delivered in October 1913, at Mobile, Ala.

exert their influence to make the Christian Teutonic world realize that which it is in need of—Unity.

It is of course not an easy matter to accomplish such a high purpose. It requires a thorough and comprehensive process of enlightenment; in this work, the schools and the press of all interested countries should combine their efforts; above all, it requires the honest desire of the governments—especially those of London, Berlin and Washington—to work together in cordial understanding. Once this determination for cordial coöperation has everywhere been evenly cultivated, all else will be accomplished without difficulty, for a way will be found by those who wish to find it.

GERMANICUS.

THE LAW OF HOSTILE MILITARY EXPEDITIONS AS APPLIED BY THE UNITED STATES

Chapter IV. The Fulfillment of the International Obligation

The manner of the performance of the duty of preventing hostile expeditions, and the means to be employed for that purpose, are matters largely or entirely for the discretion of the individual state. It cannot be said that any particular method is required or sanctioned by international law. This discretion is limited, however, by practical necessity and by the exigency of good faith.

1. Evidence of good faith

The state will find it expedient, in the first place, to provide itself in advance with the power and the means of preventing expeditions. In this way, it gives substantial evidence of its intention to meet its obligations when they arise. The obvious impossibility of the performance of its duty without so having provided makes this essential as an assurance to foreign governments of a proper regard for the requirements of the law. The government must take care that its municipal law does not fail to forbid acts contravening its international obligations. Hence it becomes necessary to provide by statutory enactment for the prevention of expeditions which may injuriously affect the rights of other states.[85]

[85] Formerly it was not the custom to embody international obligations in legislation. The present practical necessity of this is, however, apparent. Arbitrary executive repression of individual conduct is very limited under the constitutional systems of modern governments. It has, therefore, now become almost imperative as a matter of internal administration. The performance of its duty to other states would be a practical impossibility for the United States in the absence of statutory regulations.

The practical necessity for legislation must not be confused, on the other hand, with legal requirement. The statutory law concerning expeditions is primarily a matter of domestic regulation. In so far as it deals with the means of preventing hostile enterprises, another state may not prescribe its provisions. If it enacts a

The domestic legislation may be concerned both with the prohibition of objectionable acts in furtherance of expeditions and with the means of the enforcement of the prohibition. As regards the latter, the government should doubtless be armed with power sufficient for the frustration of all attempts at unlawful undertakings. It must have authority to prevent as well as to punish. And to satisfy the requirement of good faith, the prohibitive enactment must be upheld by the sanction of adequate punishment. This applies alike to the preventive and punitory phases of the law. As a means of prevention, the statute should amount to more than a mere proclamation; it should have some real deterrent force. The infliction of satisfactory punishment subsequent to the carrying out of the expedition also requires the provision of ample penalties.

A further evidence of good intentions are the executive proclamations issued in times of especial danger or difficulty. The salutary effect of these is occasionally considerable. They serve as a warning to those individuals who otherwise might not expect the enforcement of the law. They enlist the coöperation of local officials and of the public with the government for the detection of probable offenses. They may thus be of real value in preventing expeditions. In any case they have the effect of notice to foreign states most likely to be concerned of the government's intention to meet its full obligation.[86]

The Government of the United States has been accustomed to cooperate with foreign governments in the matter of the investigation of possible violations of the law, and occasionally it has supplied information of importance to other states in warding off attacks of expeditions which this government might not be able to repress. In 1884, the Canadian Government sought information from the United States concerning the basis of rumors circulated in the press of this country that a Fenian invasion was in preparation. The authorities investigated and

prohibition against certain individual conduct, it defines only an offense at municipal law, as to which a foreign government may not inquire. Since the international offense is distinct from the municipal, it is entirely independent of the existence of any domestic law. This law cannot, therefore, be required as a matter of legal right. (7 Op. At. Gen. 367).

[86] For examples of such proclamations, see Richardson's Messages, I, 157, 404, 561; III, 482; IV, 72; V, 7, 111, 271, 272, 388, 496; VI, 433; VII, 85, 91; IX, 591, 694.

made a report of the situation to the British minister.[87] The raids of the Garza bandits on the Mexican boundary, and the natural obstacles to preventing them, called forth the suggestion from the Mexican Government that it would be well for the War Department of each country to inform the other of what forces it proposed to assign to preserve the peace on its frontiers, and what system it proposed to adopt for the attainment of this end, so that, by both acting in concert, the purpose of both governments might be more easily accomplished. The United States concurred in this suggestion.[88]

When suspected violations of the law are reported by the agents of foreign governments, the authorities of this country will ordinarily take prompt action. The suspicions of foreign governments are customarily referred to the departments concerned with the local administration of the law, so that precautionary measures may be taken against any attempts at hostile enterprises.[89] But while there is seldom any lack of notifications of probable infractions of the law, the activities of other states usually stop there. The United States has constantly sought further coöperation by the local officers of foreign governments stationed in her territory. Their assistance in securing the conviction of suspected persons is often indispensable, and a formal declaration of facts in the possession of foreign officials is frequently requested of them.[90] For the sake of prompter action, it has been allowed the agents of other states to present their complaints directly to the federal district attorneys, and they have been urged to supply them with full information.[91]

The coöperation of the governments in this manner is an act of amity and comity on the part of both, required not by international law, but by the necessities of friendly relations. The willingness of one state to confer with another regarding the probable unlawful action of its own citizens, and the willingness of the other to assist in the measures taken for its protection, are evidence of the honesty of purpose and good intentions of the states concerned.

[87] MS. Notes to Great Britain, XIX, 438 (Moore's Digest, VII, 931).

[88] For. Rel. 1893, 442, and 446–447. The United States would not go to the extent of making an "alliance" for such purposes (For. Rel. 1886, 57).

[89] For. Rel. 1887, 1027–1029; 1888, I, 990; also 1885, 773.

[90] For. Rel. 1887, 1027–1029; 1892, 640–641.

[91] For. Rel. 1888, I, 990; 1871, 785, 787.

2. THE MEANS OF FULFILLMENT

In the early history of the United States, it was sometimes necessary to call upon the State authorities for assistance in enforcing the Neutrality Act, and the local militia were employed at the command of the Governor to perform this service.[92] Since the passage of the Act of 1818, the Federal Government has relied chiefly on its own agencies to enforce the law, but the aid of local officials is still frequently requested. Circulars and special letters continue to be addressed to Governors of States,[93] and they have rendered some assistance. For instance, during the Canadian rebellion of 1837, the Governors of Michigan, New York, and Vermont were requested to interfere to arrest parties making hostile preparations against Canada.[94] The coöperation of State authorities in Texas was sought to prevent the incursions into Mexico across the Rio Grande in 1892.[95]

The United States maintains no police force for the execution of the federal statutes, but the marshals and attorneys of the Department of Justice and the collectors of customs of the Treasury Department are relied upon to detect violations of the law, and to take steps for the punishment of the offenders. They are assisted by the land and naval forces of the Federal Government and the militia of the States under the direction of the President.[96]

It is the duty of the federal attorneys to collect evidence upon which intervention in the preparation of expeditions may be based, and upon which the punishment of offenders may be secured. When there is probable cause to believe that filibustering parties are being organized,

[92] 1 American State Papers, For. Rel. 589.

[93] For instance, see MS. Dom. Let., Vol. 153, pp. 672 and 673 (Moore's Digest, VII, 1021).

[94] H. Ex. Doc. 73, 25 Cong. 2 Sess. p. 5.

[95] For. Rel. 1893, 428.

[96] At the time of the Canadian rebellion of 1837, the government employed most of these agencies to prevent attacks on Canada by American citizens. The district attorneys were addressed by the Secretary of State, stating the intention of the government to fulfill its obligations; governors were requested to assist; collectors of customs were instructed to lend their aid; the United States marshals proceeded to the frontier; a revenue cutter was placed at the disposal of the collector to aid in enforcing the law; the militia was called out; and General Scott was placed in command of troops, both regular and volunteer, on the frontier.

and arrangements for hostilities are being made, they will make inquiries as to the suspected conduct. If as a result of their own inquiries, sufficient evidence is found, or if proof is submitted by other persons, they will commence legal proceedings against the individuals implicated. The attorneys receive the assistance of the marshals in the arrest of persons against whom charges of this sort are made.[97]

The arrest and detention of vessels guilty of an infraction of the law is accomplished by the collectors of customs. When vessels transporting expeditions attempt to depart in open violation of the law, clearance papers may be refused them by the officers of the port. Vessels likely to depart secretly will be arrested and detained by the collector of customs. For this purpose, he will have the assistance of the naval forces and the revenue cutters of the Treasury Department. The collector may also have authority to arrest members of expeditions within his district before they have engaged vessels or attempt to take their departure.[98]

The necessity for the patroling of the Canadian and Mexican borders during disturbances in those countries, and when filibusters have been especially active, has required the use of the army and militia.[99] They are employed in addition for the purpose of pursuing and apprehending offenders which have recrossed into this country after making unlawful invasions.[100] Property may be seized by the military forces with a view to detaining it until it can be proceeded against according to law. A vessel laden with arms for the insurgents in Canada, in 1855, was held subject to seizure though it itself was not intended to pass the border.[101]

In 1858, President Buchanan, in a special message to Congress, took the position that the power given the President to employ the land and naval forces was intended for the express purpose of the pursuit of ex-

[97] See Moore's Digest, VII, 1020 and 1021; For. Rel. 1884, 493; 1885, 773; Richardson's Messages, VI, 442.

[98] See Richardson's Messages, V, 161; Moore's Digest, VII, 1020, 1021, 1023; H. Doc. 326, 55 Cong. 2 Sess.

[99] See Dip. Corres. 1866, I, 276. Note the use of the army during the Canadian rebellion, supra, note 12; and the concentration of the army on the Mexican frontier, March, 1911.

[100] See For. Rel. 1893, 429.

[101] Stoughton *v.* Dimick, 3 Blatchf. 356 (Fed. Cas. 13500).

peditions beyond the territory of the United States. In order to render the law effectual, it was necessary to prevent "the carrying on" of such enterprises to their consummation after they had succeeded in leaving our shores.[102] In the opinion of the committee of the Senate, appointed to investigate the action of Commodore Paulding in Nicaragua,[103] "the unlawful expedition is 'carried on from the United States' when it is continued on the high seas, on its way to its destination and after it has left this country; and this is what the President is authorized to prevent by the use of the naval force." [104] This is the interpretation of that power which the government has accepted in practice.[105] An instance in point was the pursuit by the United States ship *Swatora* and the *Vandalia* of the Aguero expedition which escaped from Key West (in 1884) in spite of revenue cutters and naval vessels.[106] The United States has frequently gone so far as to station ships to intercept expeditions in the vicinity of the shores upon which the invaders intend to land. Five vessels were sent to the ports and harbors of Cuba in 1850, and their commanders were instructed to prevent the landing of any of their countrymen who might be attempting to invade that island.[107] It was in connection with the efforts of the United States to prevent the landing of expeditions in Nicaragua that the Commodore Paulding case arose.[108]

The various executive officers are empowered to take only such action

[102] S. Ex. Doc. 13, 35 Cong. 1 Sess. p. 1, 2–3.

[103] Following the suspension of Commander Chatard for failure to prevent the landing from the ship *Fashion* in a port of Nicaragua, of an expedition under the command of "General Walker" Commodore Paulding had landed marines and compelled the surrender of Walker. This action was not upheld by the United States (though it was taken with the consent of Nicaragua), since the landing of marines was an act in violation of the sovereignty of a foreign state.

[104] S. Rep. 20, 35 Cong. 1 Sess. p. 8. See also H. Rep. 74.

[105] See S. Ex. Doc. 57, 31 Cong. 1 Sess. following p. 54.

[106] For. Rel. 1884, 493.

[107] The measures taken by these vessels are described in S. Ex. Doc. 57, 31 Cong. 1 Sess. p. 54 *et seq.*

[108] The extraterritorial pursuit of offenders is, no doubt, a proper method of fulfilling the requirement of preventing expeditions. The government is free to take such measures whenever it considers the occasion justifies them. But there is no evidence that this, more than any other measure, is required of the state. The United States has not taken this action on the insistence of other governments, but rather out of abundant caution that it be not delinquent in its international relations. On the general question, see Moore's Digest, VII, pp. 1045–1049.

as may be legal to bring violaters of the law finally before the courts for the adjudication of their conduct. They have no summary powers to prevent expeditions, and ordinarily they act only on such evidence as will justify their course before judicial tribunals. At times the executive has intervened when no legal ground for bringing the parties before the courts existed. But this intervention has been only temporary and precautionary. Thus the collectors of customs have occasionally been instructed to take action to prevent the departure of vessels pending an investigation. But their authority is limited to the taking of such steps as may afford a reasonable opportunity for substantial complaint, and the submission of such proofs as will bring the case before a judicial tribunal.[109] It is probable, however, that when there is open defiance of the authority of the government, and the emergency is evident, the executive will be allowed to take summary means to disperse a hostile organization and deprive it of arms and munitions.[110]

Within the limits of its legal authority, the executive is free from the interference of the courts. On the other hand, the executive has no right to attempt to control the action of the judiciary in its proceedings in the same matters.[111] The executive branch of the government is "not justified in ordering judicial process where the judicial officer does not find legal ground for a prosecution." [112] It has no power to define or interpret laws, and, consequently, cannot establish the limits of lawful and unlawful conduct.[113] The approbation of the President or other officers can afford persons acting in dependence thereon no legal justification.[114] These officers have no dispensing power.

The part of the courts in the fulfillment of the international duty consists chiefly in the enforcement of the penalties of the criminal law. In addition, they may take preventive measures in the form of the requirement of bond to obey the law against expeditions. A bond was exacted in the case of a certain Quitman who had refused to testify before the

[109] For. Rel. 1892, 640–641.

[110] 21 Op. At. Gen. 267, 273.

[111] *Ibid.*

[112] Mr. Pickering, Sec. of St., to Mr. Bond, British Chargé, Sept. 30, 1795, 8 MS. Dom. Let. 413 (Moore's Digest, VII, 1027).

[113] MS. Notes to Foreign Legations, II, 337 (Moore's Digest, VII, 1027).

[114] Lloyd's Trial of Wm. S. Smith and Sam'l G. Ogden (Moore's Digest, VII, 917).

grand jury concerning a proposed expedition to Cuba on the ground that it would incriminate him.[115] In civil suits, the courts will refuse the enforcement of contracts made in furtherance of illegal undertakings. Contracts to furnish supplies for an expedition have been held non-enforceable as contrary to our international obligations and against public policy.[116]

Offenders against the law of their own country by the same act that offends another country cannot expect the protection of their government when in danger of punishment at the hands of the state they have attacked. Sometimes the United States Government has interceded in behalf of such persons, and it will usually take care that the treatment accorded them is not unwarranted by their offense. But the government does not recognize their right to demand this intercession,[117] and, ordinarily, it will not protest any reasonable measures taken by foreign governments against citizens guilty of attacking or invading their country. Furthermore, it will not extend its protection to oppose the action of foreign governments attempting to prevent the landing of parties against whom there is reasonable ground of suspicion of hostile intention.[118]

3. THE MEASURE OF EXERTION

The fulfillment of the international obligation requires the independent action of the government. Its duty when the danger of unauthorized hostilities against another state is imminent, is to act of its own motion to thwart the enterprise. It must itself take the initiative to prevent the departure of expeditions.[119] The voluntary assistance of foreign governments in no way detracts from the necessity for the full exercise of the power and diligence of the state thus aided; and the lack of co-operation will not excuse the government for laxness and negligence. Rather, the defense of delinquency is rendered the more difficult for the state that has been assisted in the performance of its duty.

[115] U. S. *v.* Quitman, 2 Am. Law Reg. 645 (Fed. Cas. 16111).

[116] Gill *v.* Oliver, 11 Howard 529 (quoting the Circuit Court of Appeals of Maryland). See also 14 Howard 38.

[117] Richardson's Messages, V, 113, 115–116.

[118] For. Rel. 1899, 364.

[119] 21 Op. At. Gen. 267.

In practice the United States has frequently been tempted to depart from this rule of conduct. The failures of other states properly to support by evidence the accusations they have made, and the repetition of seemingly groundless complaints, has led the government to insist on evidence as preliminary to investigation. In one instance the Secretary of State went so far as to advise a foreign government to employ its own private detectives to watch suspected parties, thus to supply the deficiency of a police force in our own administration.[120] Occasionally, minor officials have assumed the necessity of being supplied with evidence by foreign governments before they could be expected to proceed with measures in the interest of other countries. But when the issue has been directly raised, the United States has declared in no uncertain terms that the assumption of the necessity of the coöperation of other states is contrary to international law and inconsistent with the policy of this government.[121]

For the performance of its duty, three things are incumbent on the government.[122] In the first place, it shall use all reasonable means to inform itself as to whether or not a violation of the law is about to be committed. Secondly, the discovery of the probability of warlike undertakings must be followed by adequate measures of prevention. Finally, when expeditions have succeeded, whether or not through the delinquency of the government, the apprehension and punishment of the persons involved, if possible, is required.[123] Concerning the first and second of

[120] MS. Notes to Arg. Rep., VI, 134 (Moore's Digest, VII, 1058).

[121] "* * * the theory for which this government has contended, and which it is now exerting itself to maintain (is) that a neutral or friendly government is bound to use due diligence to prevent hostile expeditions from being fitted out within its territory, against a power with which it is at peace, and that such obligation of a neutral, or of a friendly, power is not satisfied by throwing upon the power whose peace or whose territories are threatened the burden of the prosecution, or the whole duty of furnishing testimony.

"The position which the United States assumed and has maintained * * * has been that when reasonable grounds were presented to a government by a friendly power for suspicion that its peace is threatened by parties within the jurisdiction of that government, it is the duty of the latter to become the active prosecutor of those threatening the peace of the former." Mr. Fish, Sec. of St., to Mr. Akerman, At. Gen., Nov. 20, 1871, 91 MS. Dom. Let. 356 (Moore's Digest, VII, 1056).

[122] See also in this connection Chap. III, sec. 3.

[123] See Wharton, Criminal Law, sec. 1908.

these principles there can be no question. Obviously they are implied in the international duty of prevention. The third requirement is made necessary for the satisfaction of offended states, and as a sanction to the prohibitory measures of the government.

Under ordinary conditions, the state employs for these purposes only such means as it finds necessary to the enforcement of its general criminal laws. At most, no more may be demanded of it than those agencies which would ordinarily suffice to restrain and prevent expeditions.[124] It is not expected that special methods shall be devised for the protection of any particular state, or for any particular time.[125] On the other hand, the diligence and vigor in the employment of these means must, necessarily, vary with conditions. The greater the probability of violations of the law, the more vigorous must be the efforts at prevention and punishment. The principle of "due diligence" for which the United States has contended, and which was upheld in another connection by the Geneva Tribunal of Arbitration, is to the effect that the diligence exercised by the state must be in proportion to the risk to which another state may be exposed through its failure in the performance of its duty.[126]

The vigilance required of the government in accordance with this rule may be expressed only in general terms. In fact, it is difficult to define even the circumstances in which the necessity for any extra exertion would be unquestionable. Thus, it cannot be said that the existence of a war will always create an occasion for special diligence, and it is more questionable that a mere insurrection, even when thought likely to lead to the violation of the law, imposes any general duty of watchfulness. However, actual notice of threatened hostile attacks prepared within its jurisdiction requires of the state attempts at prevention and punishment corresponding to the injury likely to result from failure.[127] Beyond this no rules may be laid down.

The duty to prevent hostile enterprises is limited, finally, by the fact that there is implied no guarantee against expeditions.[128] The measure

[124] MS. Notes to Cent. Amer., I, 105 (Moore's Digest, VII, 926).

[125] But the United States enacted a special act in 1838 to meet the situation on the northern boundary.

[126] See Papers relating to the Treaty of Washington, IV, 49, 50.

[127] 21 Op. At. Gen. 267, 271–272.

[128] *Ibid.* See also MS. Notes to Cent. Amer., I, 105 (Moore's Digest, VII, 926).

of exertion is, consequently, not determined by the success or failure of the efforts at prevention, and the state is not compelled to assume any responsibility because of its failures which could not reasonably have been avoided. Absolute secrecy in the preparations, difficulties in the policing of a long, thinly populated frontier, opportunities for concealment that make pursuit of offenders unavailing, are such facts as may be offered in defense of a state charged with delinquency.[129] It may also be urged in extenuation of the failure of the government that its task was rendered difficult or impossible by the complainant state. The one may hardly hold the other responsible for failures which its own conduct has rendered impossible of avoidance by ordinary care.[130]

The defense of the state must rest, however, on facts which it is beyond the power of the government to anticipate or control by reasonable exertion. Its failure to have provided itself with the means of discovering violations of the law, for instance, or the lack of authority to restrain and punish individuals for fitting out expeditions, cannot be urged in extenuation of the neglect of international duties. The want of constitutional power and defects of domestic statutes are matters which may themselves require to be remedied. The deficiencies and neglect of the state in one particular cannot operate as a bar to claims for failure in the general duty itself.[131]

Chapter V. The Enforcement of the Law

The failure of international law to prescribe specific penalties and the means of enforcement through which reparation may be secured has left states to their own resources for the redress of their wrongs. No mode of redress by litigation is, as yet, generally accepted among nations, and there is no international penal process to which individual states may have recourse. Being limited by no legal restrictions in the choice of remedies, the state may employ those which appeal to it as appropriate and effective.

The customary modes of enforcement to which states ordinarily resort do not differ necessarily with the nature of the offense they are intended

[129] For. Rel. 1893, 427.
[130] Dip. Corres. 1868, I, 430.
[131] For. Rel. 1873, III, 329, 332; Wharton, Int. Law Digest, III, 618.

to remedy. The methods employed to secure the redress of wrongs occasioned through delinquency in the prevention of hostile expeditions are the same as those applied for various other international offenses. In the choice of remedies, the seriousness and flagrancy of the offense, and the comparative strength of the nations concerned, are likely to be the determinative factors.

1. REPARATION

The amicable settlement of difficulties arising out of the state's delinquency may ordinarily be secured through indemnification to the injured country and its citizens. Restitution may be required at the hands of the members of the expedition themselves, and they may be compelled to make payment for the injury and destruction they have caused. In practice, this means of reparation is of little value. Generally only criminal penalties are practicable for such offenders as are apprehended and convicted, while many escape. But a possibility always to be met is the restoration of such captured persons and property as are brought within the jurisdiction of the defendant state. The semi-military raids of Indians and others across the boundaries of the United States have occasionally afforded this possibility. During the raids of the Garza bandits, many Mexican prisoners were carried away into Texas, and claims for their restoration were presented. It became the duty of the United States to secure their release.[132]

Most frequently, the government finds it necessary itself to make compensation in satisfaction of claims based upon its delinquency. In any case, it is compelled to assume the full responsibility for the making of reparation; and whatever the manner of settlement, it is effected in the name of the state.[133]

2. MEASURES IN SELF-DEFENSE

The forcible means of enforcement to which a state may have recourse are not limited to action against the offending state itself. While such action is resorted to to secure subsequent redress of wrongs suffered, it

[132] For. Rel. 1893, 426 *et seq.*

[133] Though most of the claims were denied, this sort of settlement is illustrated by the cases submitted to arbitration. See Moore, International Arbitrations, pp. 4028, 4029, 4040, 4042, 4054.

may be entirely unavailing to prevent the occurrence of disturbances which could not be checked and controlled, or the infliction of the irreparable damage which may come from an actual invasion. Hence circumstances may arise which make necessary the restraint of expeditions in their preparations for hostilities, by the state they are about to attack. When the forcible action against individuals is confined to the jurisdiction of the state taking it, it is, of course, an exercise of domestic authority only. But occasionally it may involve a violation of the territory of another state, and thus become a matter of international concern.

The action which it is necessary to take against an expedition still within the jurisdiction of the state of its origin must not be considered as directed against the state so invaded. It would then become an act of war in itself. But if it is not to be so regarded, it must be justified by an evident necessity of self-protection. There can be no question of the right to prevent the entrance of an invading expedition,[134] but the violation of the territory even of a delinquent state requires strong justification.

The occasion for these measures of self-defense may occur when the suddenness of a contemplated attack gives no opportunity for diplomatic protests to the responsible state, or allows insufficient time for the ordinary processes of prevention. The necessity may arise from the unwillingness or inability of the responsible state to perform its duty, and thus requires the substituted performance of the state likely to be injured. The case of the *Caroline* is a noteworthy case in point. In 1838, during the rebellion in Canada, a party collected on an island in the Niagara river, and prepared to cross to the Canadian side in the steamer *Caroline*. The men were armed, and they made their purpose of attacking Canada evident by shooting across into Canadian territory. An English force captured the steamer, set fire to it, and sent it over the Falls. In so doing, they crossed into American jurisdiction. In the discussion that followed this violation of American territory, the point of difference between the British and American Governments was reduced to the question of the necessity for the action taken. The British Government was called upon "to show a necessity of self-defense, instant,

[134] For. Rel. 1899, 364.

overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show also that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable nor excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it." [135]

The Government of the United States took a similar position in defense of General Jackson's incursion into Florida in 1818. In this instance, however, the necessity was based rather on the inability of the Spanish Government to meet its obligations, than on an emergency requiring immediate action. It was represented to Spain that the President, after an examination of the proofs, deemed them "irresistibly conclusive that the horrible combination of robbery, murder, and war with which the frontier of the United States bordering upon Florida has for several years past been visited" was due to the failures of the Spanish Government. "It is to the conduct of her own commanding officers that Spain must impute the necessity under which General Jackson found himself of occupying the places of their command." But in this case also, the justification of the measures of self-defense was limited to such action as was necessary to the purpose alleged, that is, to the preservation of control until the arrival of Spanish forces competent to perform the duty required of them.[136]

Another phase of this question is presented by the claim of the right to pursue offenders into the territory from which they came. The convenience of such a privilege led to a mutual arrangement between Mexico and the United States whereby this action would be permitted.[137] Mexico, however, regards this as a concession which cannot be required by international law. In the absence of any agreement, an invasion in the pursuit of offenders is an act of war rather than peaceable enforcement.[138] The position of the United States has been "that it rests upon principles of the law of nations, entirely distinct from those upon which

[135] Mr. Webster, Sec. of St., to Mr. Fox, Brit. Min., April 24, 1841, Webster's Works, VI, 250, 261.

[136] American State Papers, For. Rel., IV, 545, 546. See also pp. 539, 541, 215, 496.

[137] For. Rel. 1882, 396, and 404–405.

[138] For. Rel. 1878, 555–559; 26 Br. and For. St. Papers, 1419 (Moore's Digest, II, 421).

war is justified—upon the immutable principles of self-defense—upon the principles which justify decisive measures of precaution to prevent irreparable evil to our own or to a neighboring people." [139]

3. DIRECT ENFORCEMENT AGAINST THE STATE

The failure to secure the adjustment of claims arising out of preventable expeditions, through voluntary redress or by diplomatic pressure, leaves only recourse to some forcible procedure against the state charged with responsibility. Little choice is then left to the offended government. War is, of course, the ultimate remedy for international wrongs; and that this delinquency is one that may justify war is recognized by the United States.[140] Though war for this cause has never yet occurred, the possibility of such consequences has been a consideration in the plans of those filibusters who have hoped to induce the forcible annexation of neighboring territory. Often the occasion is not of sufficient moment to justify the extreme remedy. Some measure of reprisal is then the only alternative. In matters so distinctly political, reprisals have not found extensive use. They have not been employed against other countries by the United States; and other states have been, for the most part, unable to employ them effectively against it. It is probable that the only adequate retaliation would be found to be similar hostile attacks which would result in further difficulties and perhaps in war. The justification of their use is not limited, however, by this possibility. For war itself is a legitimate remedy.

CHAPTER VI. HISTORICAL APPLICATION OF THE LAW

1. DEVELOPMENT OF THE STATUTE

Statutes for the recognition of international duties by municipal law may be said to have had their origin in the United States. The first statute for the formal embodiment of the obligation of non-interference and neutrality was that enacted by the Congress of the United States in

[139] 26 Br. and For. St. Papers, 1419 (Moore's Digest, II, 421).

[140] U. S. *v.* O'Sullivan, 9 N. Y. Leg. Obs. 257 (Fed. Cas. 15974); Charge to Grand Jury, 2 McLean, 1 (Fed. Cas. 18265); Same, 5 McLean, 249 (Fed. Cas. 18266).

1794. It arose out of the difficulties the American Government encountered in performing its duties as a neutral in the wars of the French Revolution, and from trouble upon the frontier. This act included, among other provisions, the prohibition of hostile military expeditions. It was passed as a temporary measure, but was continued in force by an act of March 2, 1797, and was finally perpetuated by the act of April 24, 1800.[141]

After the Napoleonic wars, the duties of neutrals, rather than their rights, became of first importance; and the frequency of the offenses of American citizens in the matter of privateering made necessary the strengthening of the law on that subject. The Portuguese minister at Washington, when complaining of these privateers, attributed the difficulty to the lack of preventive remedies in the act of 1794.[142] In response to this suggestion, President Madison, in a message to Congress, called its attention to the need of enlarged preventive powers, and suggested that authority be given to require of the owners of armed vessels security against their unlawful use, and to seize and detain them in suspicious cases.[143] An act limited to two years was passed on March 3, 1817. On April 20 of the next year, it was made permanent.[144] While under the original law the President had had power to use the land and naval forces and the militia to prevent expeditions, and to take possession of and detain vessels, there is henceforth the authority to require security of armed vessels, and the revenue officers are empowered to detain vessels temporarily when there is reason even to suspect them of an intention to violate the law. The owners of an armed vessel were required to give bond with sureties in double the value of the vessel, cargo and armament, that it would not be used in contravention of the statute. At the suggestion of the Spanish minister that the provinces which were in civil war with Spain, not being recognized as independent, might not be included in the word "state," expeditions were prohibited against any "colony, district, or people" with whom the United States was at peace. But most important was the authorization of the

[141] 1 Stat. 381 and 497; 2 Stat. 54.
[142] See Dana, Notes to Wheaton, No. 215.
[143] Message of Dec. 26, 1816, Richardson's Messages, I, 582.
[144] 3 Stat. 370 and 447.

executive to make interposition where there was only the intention to commit the specified offense; for the sole effect of the previous law was to secure the punishment of the offenders after the actual carrying out of the expedition or cruise.[145]

The provisions of this act were later embodied in the Revised Statutes,[146] and have finally been enacted in the revision and codification of the criminal law effected by the act of 1909.[147] Difficulties on the frontier during the Canadian insurrection, in 1838, called forth a temporary statute to secure the more effective performance of the national duties. This law did not modify the principles of the earlier ones, but laid down in detail the procedure to be taken by the various officers in their enforcement, and made provision for the more speedy execution of the powers previously conferred. But aside from this temporary measure, there have been only verbal modifications of the original law.

The example set by the United States was followed by England in 1819. The Neutrality Act of that year seems to have been patterned upon that of the United States and does not differ materially from it, though the means of enforcement have been regarded by the United States as less effective than those of this country. No other states have such complete provisions on this subject, but many have laws to prevent such action on the part of their citizens or subjects as may involve them in war with other states or subject the state or citizens to reprisals. Usually these laws are a part of the penal code, and, in some instances, they bear very indirectly on international obligations. Banishment and transportation are sometimes imposed as punishment.[148]

2. REVIEW OF NOTEWORTHY EXPEDITIONS

In 1806, Francesco de Miranda, commonly known as General Miranda, organized a military expedition in New York, and sailed against Caracas with the purpose of liberating the Spanish colonies. He sailed on the

[145] 4 American State Papers, For. Rel. 103.

[146] Sections 5281, *et seq.*

[147] Act of March 4, 1909, "An act to codify, revise, and amend the penal laws of the United States."

[148] The present English statute is the Foreign Enlistment Act of 1870, 33 & 34 Vict. c. 90. See Wharton, Crim. Law, sec. 1908, note; also Moore's Digest, Vol. VII, p. 1005.

ship *Leander* and procured two schooners at Jacmel with which he proceeded toward South America. He was met by two Spanish men-of-war and was defeated. Miranda escaped with the *Leander*, but ten of his followers were condemned to death as pirates. In July, 1806, Col. Wm. S. Smith, surveyor of the port of New York, and Samuel G. Ogden were tried at New York for being concerned in setting on foot the expedition. The charge of the judge was strongly against the defendants, but the jury returned a verdict of not guilty. Mr. Dana says: "There seems to be no doubt that this (expedition) might and ought to have been prevented by us." On the other hand, Mr. Madison, in an unofficial communication to Mr. Monroe (March 10, 1806), says: "The truth is that the Government proceeded with the most delicate attention to its duty; on the one hand keeping in view all its legal obligations to Spain, and on the other not making themselves, by going beyond them, a party against the people of South America. I do not believe that in any instance a more unexceptionable course was ever pursued by any government." [149]

During the time of the South American Revolutions, the chief difficulty arose with regard to privateering, and no important military expeditions occurred. The settlement of claims secured by the treaty of February 22, 1819 expressly included (Art. IX) a renunciation on the part of Spain of all claims for injuries caused by the expedition of Miranda. But because the treaty included a reciprocal renunciation of all claims for damages or injuries up to the time of signing, the liability of the United States for such claims was not definitely determined.

The Texan war of independence offered opportunity for many unlawful undertakings by citizens of the United States. The sympathy of the people of the vicinity for the Texan cause was such that the prevention of expeditions by the Federal Government was rendered very difficult, and there is little doubt of the fact of extensive violations of the law, but slightly concealed. Considerable discussion of the matter occurred, but no final settlement was attempted.[150]

The Canadian rebellion under the leadership of Wm. L. McKenzie,

[149] Moore's Digest, VII, 917; Boyd, Wheaton, International Law, sec. 439i; Dana's Wheaton, sec. 439, note; 2 Madison's Writings, 218, 220.

[150] H. Ex. Doc. 74, 25 Cong. 2 Sess.

which occurred in 1837, was the occasion for commotions at various places along the border. Upon the defeat of the insurgents, many sought refuge in the United States, and in this country continued their operations, securing recruits, and making preparations for a further attack on Canada. Some thousand men were collected in this manner on Navy Island on the Canadian side, and were equipped for service. Every possible measure was sooner or later taken by the American Government to enforce the law, and it seems little more could reasonably have been demanded by the British Government. However, the invaders were in a great degree successful, and their operations were not at all in the nature of a surprise. It was in part the failure of the United States that justified the destruction of the *Caroline* in American waters by the British forces.[151]

"In 1849 Lopez, a Spanish adventurer, planned an attack on Cuba with the object of annexing it to the United States. The President issued a proclamation calling upon every officer of the government to use every effort in his power to arrest any persons concerned in this expedition. Nevertheless, Lopez left New Orleans on the 7th of May 1850, in a steamer, accompanied by two other vessels with about five hundred men on board. He landed at Cardenas in Cuba, but was driven off by the Spanish troops and escaped back to the United States. He was then arrested and brought to trial, but as the judge refused to allow any delay to procure evidence, he was discharged amid the cheers of a large crowd; he was again prosecuted at New Orleans, in July 1850, and a true bill was found against him, but the government failed to make out its case. On the third of August 1851 he again started from New Orleans with an expedition of four hundred men; this time he was overpowered by the Spaniards and executed at Havana." [152]

At the time of a revolution in Nicaragua in 1855, the United States received complaints against its citizens for their "armed intervention." Apparently an expedition had proceeded from San Francisco; and J. W. Fabens and a certain Boulton were arrested for recruiting men for

[151] See H. Ex. Docs. 64, 74, 302, 25 Cong. 2 Sess.; 183, 25 Cong. 3 Sess.; 33, 26 Cong. 2 Sess.; 128, 27 Cong. 2 Sess.; H. Rep. 162, 26 Cong. 2 Sess.; S. Ex. Doc. 99, 27 Cong. 3 Sess.; Moore, International Arbitrations, III, 2419, *et seq.*; Scott's Autobiography, I, 305–317.

[152] Boyd's Wheaton, sec. 439j.

another, the "Kinney expedition." Kinney was indicted, but evaded trial by leaving the United States.[153]

Perhaps the most notorious expeditions were those of William Walker. In his first attempt, he planned to gain possession of the Mexican territory of Lower California. He set sail in October 1853 with an expedition from San Francisco, invaded the territory, killed a few people, and wounded others. He was reinforced by another expedition sailing in the *Anita* from San Francisco, but was eventually driven out of the country. This expedition seems to have given rise to the name "filibuster"; which has since been used to designate expeditions of this kind in America. The enterprises of this time were frequently disguised under the name of "transit" and "immigration" companies.

On May 4, 1855, Walker again set sail from San Francisco, this time for Nicaragua. Arriving at Realejo in June, he assumed the title of President of Nicaragua, and was recognized as such by the representative of the United States (though contrary to the instructions of the Department of State). He was finally surrounded by the Nicaraguan forces, and compelled to surrender, in May 1857. But through the intercession of the commander of the United States ship *St. Mary's* he was allowed to leave the country unmolested, and was taken away with his followers on board that ship.

On returning to the United States, he organized another expedition, at New Orleans. The attention of the authorities was called to it, and in consequence the government issued a circular to its officers for the enforcement of the law. It was reported that two thousand men were enrolled and over a million dollars subscribed for the enterprise. On the 10th of November, Walker was arrested and released on bail of two thousand dollars. The next day he embarked from New Orleans with three hundred armed followers, went to Mobile, where he was joined by more adventurers, and then set sail for Nicaragua in the ship *Fashion*. Commander Chatard was present at Punta Arenas with the United States ship *Saratoga* at the time of the arrival of the expedition, and previously had received the government's circular calling for the enforcement of the law in this particular. He was afterwards suspended from command for his nonaction on this occasion. On December 6, Com-

[153] See Moore's Digest, VII, 924 and 925.

modore Paulding arrived. On the 8th he demanded the surrender of Walker and his army. Because of the violation of Nicaraguan territory in securing the surrender, Walker was released from custody by the Department of State.

Walker made three more attempts at invasion of Central America. An expedition started in December 1858, but broke down because of the wreck of a vessel. In November 1859, he set sail again in the *Fashion*, but was compelled to put back for want of stores. In June, 1860, he effected a landing in Central America, but was unsuccessful. He was shot at Truxillo in September 1860.[154]

The expedition into Mexico was made the subject of claims against the United States by the Mexican Government. The titles to the claims were in nine individuals, claiming $5,680,110. The claims of eight were dismissed because their Mexican citizenship was not proved, and the ninth was dismissed for lack of evidence.[155]

In 1853 (March 26), there occurred a raid by one Norton against the town of Reynosa in Mexico; and in 1860 (April 5), an expedition under Col. John S. Ford had attacked the same town. Claims on these accounts were also submitted to arbitration, but were disallowed. In the first case it was not proved that the expedition had been prepared in the United States, nor that it had been known to or countenanced by the officers of the United States, nor that the expedition could have been prevented. In the second case, it was shown that there had been an understanding between the commander of the Mexican forces and Col. Ford, and that no injury had been done to persons or property.[156]

"October 19, 1864, a party of twenty or more persons, acting in the interest of the Confederate States, who had been commorant in Canada, raided the town of St. Albans, Vt.; fired shots at various persons of whom one was killed; set fire to several buildings, and appropriated the funds of the banks, together with horses and other property. They

[154] See Papers relating to the Treaty of Washington, IV, 301, *et seq.*; an account of filibustering expeditions in the opinion of Sir A. Cockburn in the Geneva Arbitration. See also S. Ex. Doc. 13, 35 Cong. 1 Sess.

[155] Moore, International Arbitrations, III, 4028.

[156] Moore, Int. Arb. 4040. But the umpire said: "If the Mexican Government considered that its territory had been violated, it had a right to demand satisfaction for the violation."

then returned to Canada, where some of them were arrested. The incident formed the subject of an extended diplomatic correspondence. Claims against Great Britain in behalf of the citizens of the United States who were injured or suffered loss were presented to the mixed commission under Art. XIII of the treaty of May 8, 1871. These claims were unanimously disallowed, on the ground that the enterprise was conducted with such secrecy that no care or diligence which one nation might reasonably require of another in such cases would have been sufficient to discover it." [157]

The claims on account of the Lake Erie raid, which was an attempt by Confederate refugees to release three thousand prisoners on Johnson's Island in Lake Erie, were disallowed on the same ground.[158]

Bagdad (Bocas del Toro), Mexico, was captured and pillaged by a number of Americans, aided by a force of Mexicans and negroes and others (January 5, 1866). Some were deserters from the American army; some were discharged soldiers; others were members of the army at the time of the attack. Claims arising from this raid were dismissed because no lack of due diligence was proved.[159]

The operations of the Fenian organization in the United States have been the source of considerable difficulty for the American Government. June 1, 1866, the first Fenian expedition set out from Buffalo with Fort Colborne in Canada as its immediate object. It was repulsed, and sixty-five prisoners were taken. The remainder of the Fenians fled back into the United States, where they were arrested to the number of three hundred and seventy-five by the American authorities. The arms of these were taken from them, stores of arms at Buffalo, Ogdensburg, and St. Albans were seized, and the arrest of other Fenian leaders was ordered. On the sixth of June, the President issued a proclamation authorizing the use of the military forces and militia to enforce the law. But later the prosecutions were abandoned, and some of the arms were restored.[160]

The second raid started from St. Albans and Malone (1870). It was

[157] Moore's Digest, VII, 928; Int. Arb. 4042.
[158] Moore, Int. Arb. 4042.
[159] *Ibid.*, 4029.
[160] Papers relating to the Treaty of Washington, IV, 303.

repulsed, and refuge was again sought in the United States. Several leaders were arrested and quantities of arms were seized. The Malone raiders were condemned to fine and imprisonment. Some of the St. Albans raiders were fined, but the leader, O'Neill, and his companions were pardoned unconditionally by the President.

O'Neill led a third expedition into Canada in 1871. He was arrested by American troops, but was discharged because of the lack of evidence of the commission of any overt act within the United States.[161]

"In 1869, Cuba again became the destination of hostile expeditions, organized in the Union. Mr. Fish, the American foreign secretary, admitted 'with regret that an unlawful expedition did succeed in escaping from the United States, and landing on the shores of Cuba.' In the following year, a notorious vessel, the *Hornet*, was permitted to leave New York for Cuba; she was seized several times before getting there by both British and American authorities, but finally managed to effect her purpose of landing an expedition in the island." [162]

"After the announcement by Spain in 1878 of the close of the insurrection known as the Ten Years' War in Cuba, the Department of State was in receipt of frequent representations from the Spanish legation as to alleged hostile expeditions of more or less consequence, which were reported to be in preparation in the United States against the peace of Cuba." [163] It was reported in 1884 that a certain Aguero was preparing a hostile expedition at Key West. The government took prompt measures to prevent its departure. Officers were notified, revenue cutters were dispatched there, and the United States ship *Vandalia*, then in that port, was ordered to aid in the enforcement of the law. Aguero succeeded in escaping in spite of these efforts. The *Vandalia* and the *Swatora* were sent toward Cuba to intercept the expedition, and they were aided near our coast by the revenue cutters. These also failed. When the schooner that conveyed Aguero returned to Key West, proceedings were begun against it and the crew. The government sent a special attorney for this purpose; the collector of customs

[161] Papers relating to the Treaty of Washington, IV, 303.
[162] Boyd's Wheaton, sec. 439k.
[163] Moore's Digest, VII, 1020, contains an account of numerous instances.

was removed for his failure. The schooner was forfeited, and certain of the crew were punished.[164]

During the Riel rebellion in Manitoba in 1885, it was reported that both Indians and Americans from the United States were taking part on the side of the insurgents, and that they were taking cannon and munitions across the border with them. The government, consequently, took measures to prevent all such expeditions.[165]

In December 1892, Mexico was afflicted with the raids of bandits across the Texan border. Complaints of these were made at Washington, particularly of the Garza bandits who were old offenders. It appears that they had made an incursion into Mexican territory opposite San Ignacio, that fire was set to the Mexican barracks, four privates and two officers being burned. Complaints were made of numerous other raids occurring from time to time. It was charged that the American Government had not maintained a sufficient force on the border to prevent violations of the law, and that there had been carelessness on the part of the local officials of Texas. The United States defended itself by pointing out the difficulties in policing the frontier, which was a long line, thinly populated, where the nature of the country offered every facility for concealment and escape, and where the only obstacle to the raiders was a river easily crossed at any point. On returning into this country the bandits dispersed and scattered over the country singly or in small parties so that they never presented an object of attack by troops, making pursuit of them very difficult. Efforts, however, were made to suppress them. Bandits were captured from time to time to the number of thirty-eight. Concerning these efforts, Mr. Romero, Mexican minister at Washington said:

"The circumstance that a considerable number of bandits who took part in the late incursions into Mexico, after organization in Texas, should have surrendered shows the efficacy of the pursuit of them by the agents of the United States Government, and is in contrast with the leniency manifested during the first two raids, one led by Ruiz Sandoval, and the other by Caterino Garza.

"It is very satisfactory to observe that the active and efficacious

[164] For. Rel. 1884, 493.
[165] Moore's Digest, VII, 932.

pursuit of these bandits is bearing fruit, and I believe that in the future there will be no further invasions of a friendly country like those which have occurred in the last three years." [166]

In 1899, the objective point of filibusters was Honduras, the intention being to foment insurrection there. Action was taken by the governments of both Guatemala and America,—Guatemala was the ostensible destination,—to prevent the landing of an expedition in the steamer *Managua*, and to prevent the commission of any hostile acts. At the same time the customs authorities at New Orleans were engaged in preventing the embarkation of one hundred and sixteen alleged filibusters from Kansas City. Apparently the authorities were entirely successful. Clearance was withheld from two steamers until examination could be made of certain passengers, and members of the expedition were not allowed to depart. The president of Honduras asserted that by the action of the two governments the menace of filibusters had disappeared.[167]

The foregoing incidents are only the most remarkable of those with which the United States has had to deal. Naturally only those which have presented considerable difficulty have attracted much attention, and only in case some question of the law or its enforcement was presented is the record considered valuable or important. A fair estimate of the diligence of the American Government, and the efficacy of its enforcement of the law, cannot be based on these exceptional cases alone. It is, of course, impossible here to review the numerous attempts at expeditions which have been frustrated before having become of any consequence, and those which have not attracted the attention even of foreign governments likely to be concerned. But a review of one brief period more in detail will at least suggest the probable character of others and of the whole history.

On November 30, 1897, Mr. Gage, Secretary of the Treasury, made a report to the House of Representatives on the exertions of his department in the prevention of expeditions to Cuba during the insurrection there in the nineties. His report covered the period from June 11, 1895, to November 30, 1897. On the earlier date, the Treasury Department

[166] For. Rel. 1893, 445–446. See pp. 425–435, 440–448, 456.
[167] *Ibid.*, 1899, 364–370. See also Moore's Digest, VII, 1025.

issued a circular of instructions to all collectors and deputy collectors at the sixty-four ports and subports on the Atlantic coast from New York City to Brownsville, Texas, enjoining vigilance in the enforcement of the neutrality laws. The length of coast covered was 5,470 miles. In an elaborate report made by the legal advisor of the Spanish legation, sixty attempted expeditions were listed for the two and one half years. Of these, twenty-eight had been frustrated through the Treasury Department, five were prevented through the efforts of the Navy Department, four by Spanish authorities, two were wrecked, one was driven back by storm, one succeeded through the use of British territory, and the fate of one was unknown. Seventeen, Spain considered successful violations of the American law. With regard to these, the Secretary of the Treasury reported as follows: In the seventeen expeditions, there were nine vessels involved. Only five expeditions proceeded by steamships of considerable proportions; twelve went on four tugs and one pilot boat, each of less than one hundred net tons. Of the five expeditions, two went on the American ship *Laurada*, three on three foreign ships (which could not leave port without the consent of their consuls). The aggregate registered tonnage of the six American vessels was 1,331, of the foreign vessels, 1,772. It appears from the detailed review of the seventeen expeditions, made by the Secretary, that Spain exonerated the United States in the case of one of the expeditions on the *Laurada;* concerning another, the Spanish officials disagreed as to the date and could give no accurate information; in three cases the vessels were subsequently wrecked and any procedure against them was impossible; in four cases, the principals were sentenced to imprisonment; in one case the vessel was protected by British jurisdiction, but the principal was punished; in three cases the vessels were libelled for forfeiture on evidence furnished by the Treasury Department; in one case a libel was dismissed; in one case more time was required for investigation; in the case of the vessel that was not heard from the escape was charged to the negligence of a Spanish agent and the unwise advice of the Spanish legal advisers at New York.[168]

[168] Treasury Dept. Doc., No. 1989 (H. Doc. 326, 55 Cong. 2 Sess.).

Chapter VII. Conclusion

The United States claims the distinction of having taken the lead in the development of the principles of non-interference and neutrality which are now recognized by the community of nations. She was the first to make international obligations the subject of municipal law. With regard to the prevention of private acts of war against friendly countries, little criticism has been passed upon the standard which this country has set as a measure of its own conduct, and which it has demanded of others, unless it be that it goes further and requires more than the usage of nations has hitherto sanctioned. There is no doubt that the United States has intended only to shape its policy in accordance with the just and necessary demands of international intercourse with states in the relation of peace; and if it has set a high standard in the prevention of hostile expeditions, it is to be remembered that the principles it has maintained have been enforced chiefly against itself. It has itself seldom been the object of serious or dangerous attack by military invaders through the negligence of other states.

In the application of these principles, inevitable controversies have arisen. Foreign governments have been dissatisfied with the tardy cognizance taken of suspected undertakings, and with alleged indifferent exertions for the prevention of the expeditions. They have challenged both the sufficiency of the modes of procedure and the diligence of the government in the performance of its duty. The difficulties which have thus arisen have involved questions of fact rather than law. That the United States has at times been inconsistent in practice and untrue to the spirit and even the letter of its own principles is perhaps not to be denied. It is altogether probable that in some instances demanding the greatest diligence the government was deliberately negligent.[169]

[169] The Lopez expeditions (see Chap. VI, sec. 2) were matters of common report, and the progress of preparations was published from time to time in the daily press.

"The story of all these expeditions as told in a great part in the proclamations of the different Presidents, is pretty much the same. Some scheme of annexation, or other form of invasion is started, public meetings of sympathizers are held, a reckless soldier of fortune is chosen for chief, funds are raised by bonds issued on the security of the public lands of the country it is proposed to conquer, arms are collected, recruits are advertised for under some transparent verbal concealment of the object, and at

For the most part, however, the failures of the government in the enforcement of the law have been due to obstacles in the form of official and popular disregard of international obligations. At times local officers have neglected their part in the performance of this duty out of sympathy for the cause of the filibusters. More frequently public sentiment has been expressed against the punishment of offenders, juries have refused to convict, and popular support of the enterprises has interfered with the regular processes employed for prevention. The Spanish minister once took occasion to impugn the sufficiency of the methods of procedure in the United States for this reason, and attacked particularly the trial by jury, which, it was asserted, was almost certain to result in the acquittal of the offenders through the influence of public opinion.[170] The numerous violations of the law during the Texan revolution were made possible through such circumstances as these, which the central government was powerless to control.[171]

least a certain number of men are got together, and embark, or otherwise set forth. If the country against which the attack is directed is feeble or unprepared, scenes of outrage and bloodshed follow, until the marauders are driven to the coast, where they find refuge aboard American vessels (in some cases it has been on board ships of war), and return to the protection of the United States, to prepare for a fresh attack. If the country is able vigorously to repel them, as in the case of the Fenian raids, they content themselves with a demonstration on the frontier, seek at once the shelter of their own country, are disarmed, and the ringleaders are perhaps tried. Those who are convicted are almost certain of an immediate pardon. After an interval the arms are restored, and unless the scheme has been so discredited by failure as to be incapable of revival, preparations are forthwith recommenced for another attempt, and everything goes on as before. * * * Laws no doubt have been passed, and proclamations in abundance issued. But in spite of all this, privateering, armed incursions into countries at peace with the United States, hostile raids, and filibustering expeditions have gone on as before." Sir A. Cockburn, Opinion in the Geneva Arbitration Papers, relating to the Treaty of Washington, IV, 307.

[170] For. Rel. 1885, 774.

Much earlier (November 16, 1818) the Spanish minister, Don Luis de Onis, had made the same complaint in connection with privateering: "Whatever may be the forecast, wisdom, and justice conspicuous in the laws of the United States, it is universally notorious that a system of pillage and aggression has been organized in several parts of the union against the vessels and property of the Spanish nation; and it is equally so that all the suits instituted by his Catholic Majesty's consuls, in the courts of their respective districts, for its prevention, or the recovery of the property, when brought into this country, have been and still are completely unavailing." Boyd's Wheaton, sec. 439i.

[171] H. Ex. Doc. 74, 25 Cong. 2 Sess.

While generally the United States could not have been held technically responsible for its failures thus occasioned, the frequent repetition of such occurrences ought surely to lead to the consideration of her modes of fulfillment of the international duty as inadequate. The defense of the government has been that it employed those means ordinarily effective for the enforcement of the general criminal laws of this country. The question as to whether or not they are in fact adequate to the needs of internal administration is one which perhaps cannot be raised in international law except in a very general way. It is evident, however, that the United States suffers both in municipal and international affairs from interference in legal processes by popular influence and extraneous considerations in the enforcement of the law. As in the municipal law, the remedy for these virtual international delinquencies lies not in sounder principles and better laws, but in the creation of a different popular attitude toward the law, and in the perfection of legal and administrative machinery.

On the other hand, the indirect responsibility for filibusterism lies in some measure in its victims themselves. The turbulent condition of certain Latin-American countries has offered a standing invitation to adventurers. The aid of American expeditions has been expressly sought by insurgent factions. In other cases, misgovernment and oppression and misguided policies have almost justified the attack if not the violation of international law. The removal of the inciting cause would doubtless abate local sympathy in the United States for expeditions, and go far toward making the exertions of the government absolutely effective. The establishment of stable and efficient governments in the Latin-American countries would make filibustering a more dangerous and hopeless undertaking, and would relieve the United States of the oft-times burdensome duty of warding off the spoilsmen. When the waste places have been filled, filibusterism, as freebooting and buccaneering, will have become a tradition.

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[172] This bibliography contains only the documentary material bearing upon the points included in this study. Most text-writers in international law touch briefly upon some of the questions involved in the discussion in their chapters on "state responsibility" and "neutrality." To this extent their works will be found to be useful. Beyond this the literature of international law contains nothing important on the subject. The history of some filibustering expeditions has been imperfectly written in certain monographs; but these are of doubtful authority.

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AERIAL-LAND AND AERIAL-MARITIME WARFARE

Now that the conquest of the air has become an accomplished fact and the adaptability of aircraft to hostile operations has been fully demonstrated, the question of the necessary modifications of, or additions to the laws of warfare becomes a matter of present interest and importance. It would be as idle as presumptuous for any writer—no matter what his reputation or ability—to attempt the formulation of a complete code that takes into account a "law of the air." Such a work could be satisfactorily accomplished only by an international conference after an exhaustive discussion and a nice adjustment of belligerent and neutral interests. Possibly the Third Hague Conference, scheduled to meet in 1915, may undertake the work; but wars do not wait on conferences, and hence a study of the subject in the light of recent developments may serve a useful purpose.

"Aerial warfare" is a term that some writers have used for what I prefer to call "aerial-land and aerial-maritime warfare." "Aerial warfare" is objectionable from a military point of view and ambiguous from any point of view. It appears to imply combat involving aircraft, but it is not clear whether combat exclusively between aircraft, or any form of hostilities in which one or more aircraft participate is intended. The principal objection to the term is that it implies that there is a warfare independent of the other two "elements," land and sea. Considering the three elements—land, sea and air—any kind of warfare must always involve at least two, one of which is the air; because the projectiles employed are hurled through that element, often at great altitudes. When aircraft participate in hostilities, most of the projectiles and all demolished matériel fall to the earth or the sea. Again, the air is such an unstable element that aircraft can sustain themselves in it for brief periods only, measured in hours. These considerations point to the conclusion that so-called "aerial-warfare" can not logically claim a separate field in international law, but should be treated as a branch of land or sea warfare,—depending upon the subjacent element.

Aircraft are at present employed almost exclusively for military and recreative purposes. While it is true that in Germany airships have been used for transporting a limited number of passengers and small quantities of freight, such projects have been undertaken for the purpose of encouraging popular interest in aeronautics and for the revenue to be derived from tourists who can afford the luxury of a new method of travel. The application of aerial navigation to international trade is *nil*. This is a significant fact, since it means that, in time of war, every aircraft approaching a zone of belligerent operations on land or sea may be treated as a war craft, unless the intruder can establish his non-belligerent character and the fact that he was driven thither by stress of weather or by other form of *vis major*. Nearly all of the discussions on the law of the air in time of war are based upon judicial analogies and a consideration for the rights of an aerial commerce that does not now exist and may not exist for many years to come. As may be expected, there is considerable divergence of opinion. Meanwhile those Powers that pursue a policy of military preparedness have developed strong aerial fleets involving heavy expenditures in both life and money.

The armament of these aircraft and their employment in war and military exercises—considered in connection with the discussions of military writers—form a more reliable guide to the law of the air in time of war than academic discussions. The experience of the past proves conclusively that a belligerent will employ all of his engines of war to the utmost advantage, so long as such employment does not involve deliberate cruelty or treachery, or transcend the laws of war. Furthermore, it is idle to expect an aerial Power to vote at an international conference for any proposition that clips its own wings. We shall find then that the most profitable way of studying our subject is to determine what belligerents probably will do, rather than what they ought to do. This method of approach necessitates first a brief résumé of military aeronautics.

Aircraft are divided into three general classes:

(1) *Aerostats*, or non-dirigible balloons. These are the old-type spherical balloons, free or captive.

(2) *Dirigible balloons*. These are balloons of elongated form, driven and steered by machinery; they are also called *dirigibles*, or *airships*.

(3) *Aeroplanes,*—which are heavier-than-air machines lifted into and driven through the air by their own dynamic power.

Non-dirigible balloons for military purposes have practically been superseded by the other two types of aircraft.

Dirigible balloons are very expensive, one of the modern "battle-ship" type costing about $170,000. They are constantly increasing in size and power. One of the recent German Zeppelins (the L. Z. IV) [1] is nearly 500 feet long, has a diameter of 46 feet, a volume for gas of 700,000 cubic feet, and is fitted with motors of 600 horse-power. A powerful military dirigible carries a crew of about fifteen men, several machine guns, radio apparatus, a bomb-throwing device, a searchlight and over a ton of explosives. While the specifications for the 1913 German dirigibles require a gas and petrol capacity for a continuous trip of 50 hours and a maximum speed of 51 miles per hour, an average cruising range in fair weather may be taken at 40 miles per hour for 25 hours, or 1000 miles.

It is necessary to provide large and expensive sheds for dirigibles, as there is considerable risk in landing or anchoring in the open. Each cruise of an airship contemplates a departure from its shed and a return thereto. In Germany and France—the foremost states in the development of airships—"home stations" providing one or more airship sheds are distributed with special reference to tactical and strategical considerations.

Dirigibles are especially useful for making extended strategical reconnaissances, for night operations, and for raids upon shipyards, arsenals, hangars, depôts of supply, etc. They are rarely used in the daytime for attacking military or naval forces, because, in order to escape hostile fire, they must remain at such a great altitude as to render their own fire and observations mostly ineffective. At night, however, air-

[1] This is the German army dirigible that, as a result of adverse meteorological conditions, entered the air space above French territory during its trial trip. The aeronauts voluntarily landed at Lunéville, April 3, 1913, in order to prove that it was not a case of espionage or voluntary invasion. The German explanations were accepted, but the French were given an excellent opportunity to study a type about which the Germans had endeavored to maintain a strict secrecy. One of the most striking innovations noted was a platform on top of the balloon, presumably for mounting a machine gun capable of vertical fire.

ships are most formidable, as their presence is not revealed until they display their searchlights, and even then the subjacent forces have no way of estimating their range. A hostile airship hovering over any locality will have a decided moral effect upon both combatants and non-combatants.

The dependence of a dirigible upon its shed limits the application of such craft to naval warfare. It is not as yet practicable to base an airship upon a marine vessel. Dirigibles, however, may be used to considerable advantage in coastal warfare and in transmarine raids where the objective is within their cruising range. With a view to their employment in such operations, aerial-maritime states assign a number of their dirigibles to the navy, naval personnel being presumably more familiar with supra-marine navigation than army personnel.

Aeroplanes are comparatively inexpensive. One suited to military purpose may be purchased for about $5000. The development of this type of craft during the last few years has been remarkable. France leads all the Powers, her aerial fleet comprising nearly three hundred aeroplanes. As a result of confidential experiments made at the Toulon arsenal, France has decided to protect all her machines with armor so that they can fly low enough—2500 feet—to make effective observations, and still be protected against shrapnel and infantry fire, which is effective against unprotected air-craft below 4000 feet. The present tendency is to employ four types of aeroplanes, all armored: (1) single-place machines for short scouting trips at a speed of 70 miles an hour; (2) two-place machines with a speed of 60 miles an hour for detailed reconnaissances; (3) two-place machines with a speed of 70 miles an hour armed with machine guns, a bomb-projector and a number of bombs, such craft being employed for pursuing and attacking hostile aeroplanes and dirigibles; and (4) several-place types of heavy weight for extended strategical reconnaissances at a speed of 60 miles an hour.

Aeroplanes can readily rise from and light upon ordinary clear ground, provided that a run-way of two hundred yards or so is available. They are rarely employed at night on account of the great risks involved. They cannot as yet carry searchlights, and if any accident should occur to a machine, necessitating vol-planing to earth, it would almost invariably be wrecked. Aeroplanes are not very effective in discharging

bombs, as they can carry a small supply only and must maintain a minimum speed of about forty miles an hour in order to sustain themselves.

A hydro-aeroplane is an aeroplane designed to rise from and light upon the water. Some hydro-aeroplanes carry wheels which will permit them to rise from and light upon the land as well. These machines are especially adapted to naval and coastal operations, and are ordinarily manned by naval personnel. Special types have been developed which can be disassembled and stored on board a warship. For flight they can be launched by a special device from the ship, but more usually they are lowered overboard, the wings attached, and they rise into the air after a preliminary run on the water. A hydro-aeroplane, returning to its ship, alights near the ship, the wings are detached and the machine is then hoisted on board. A large warship can easily carry two hydro-aeroplanes; or if it is preferred, a specially designed ship may carry and handle the machines for a whole fleet.

Both airships and aeroplanes will drop bombs upon personnel and matériel ashore and afloat, when it is believed that any advantage may result therefrom. While it is generally agreed that the best method of meeting an attack by aircraft is by a counter-attack of the same kind; nevertheless, both land and naval forces must be prepared to repel such attacks. Artillery fire is used, but so far on account of the technical difficulties involved therewith, the principal reliance is placed on volley firing with rifles. There are no precedents for combats between aircraft. Opinions differ considerably as to tactics and the probable outcome. Combat will not be limited to aircraft of the same class. Aeroplanes will not hesitate to attack dirigibles, using bombs as their principal weapon, because aeroplanes can ascend to greater altitudes than airships; while dirigibles will ordinarily employ machine gun fire against aeroplanes.

One of the preliminary stages of a war between states within aerial-cruising range will probably be a series of cross-raids. The first major operation will usually be a struggle for the supremacy of the air. So long as both belligerents maintain their service of aerial reconnaissance, they are in the position of checker players, each of whom can see the other's dispositions and moves. This fact, by the way, will serve to reduce the sacrifice of life incidental to the slow and uncertain method of land reconnaissance, and to chance encounters. Much of the "fog

of war" will be dispelled. If one belligerent loses his aerial fleet, his adversary, if well provided with aircraft, will attain such a decided advantage that he can expeditiously push his operations to a decisive conclusion, "a consummation devoutly to be wished" from both a military and a humanitarian point of view.

Germany serves as a striking illustration of the sacrifices a powerful state will make in its determination to attain aerial supremacy. In developing her rigid dirigibles, she has had about three million dollars worth of them converted into wreckage with a considerable loss of life; but nevertheless she is not daunted, and contemplates spending about seven million dollars during the next two years in the rebuilding of her fleet of airships.

Aircraft have been employed in all the wars that have occurred since the close of the Second Hague Conference. In the Turko-Italian Wars of 1911, the Italians used both airships and aeroplanes in the reconnaissance and bombardment of Turkish-Arabian positions. Some of the aircraft had narrow escapes from destruction or capture and several Italian aviators were wounded. The Turks, as a rule, succeeded in driving attacking aircraft to a considerable altitude by infantry fire. They experimented with cannon, and it was reported that they obtained fairly good results with a specially-mounted Krupp gun. They had no aircraft. During the Balkan Wars, all of the belligerents used aeroplanes manned mostly by foreign aviators. No airships or hydroaeroplanes were put into service. Artillery and infantry firing was employed to such good effect that it became exceedingly dangerous for aeroplanes to descend below 4000 feet. Jules Constantin, a French aviator in the Bulgarian service, was mortally wounded in a flight above Tchatalja, but he managed to land safely before he died. Bombs were occasionally dropped on Turkish positions, especially in Adrianople. It was fully demonstrated that bomb-dropping aircraft produce a decided moral effect. The first attempt to disable a war vessel by aerial bombs occurred last July during the Mexican insurrection. A French aviator—one Didier Masson—in the service of the "Constitutionalists," circled above the town and bay of Guaymas and attempted to drop several bombs on the federal gunboat *Tampico*. One of them fell within a few feet of the vessel, but she was not damaged. The aeroplane es-

caped unharmed, probably because the men on board the *Tampico* were such poor and indolent marksmen.

Summing up our discussion of military aeronautics, it is clear that the principal military Powers in their next wars are prepared for and expect to engage in combats between aircraft, between aircraft and land forces, between aircraft and maritime forces, and in aerial bombardments.

It will be convenient to enumerate next the few provisions of conventional law that relate to aerial personnel and matériel.

The First Hague Conference adopted a Declaration forbidding, for a period of five years, the discharge of projectiles and explosives from balloons or by other methods of a similar nature. The reasons advanced in favor of the prohibition were that the use of balloons for such purposes would endanger non-combatants in subjacent territory, that the various means of injuring an enemy were already sufficient, and that such attacks on combatants *en masse* would savor of treachery. These arguments are mostly the stock ones invoked against the use of all new methods of attack. Captain (now General) Crozier of the American delegation seems to have been the only delegate who foresaw the latent possibilities of aerial navigation, for, on his motion, the prohibition—originally a permanent one—was restricted to a period of five years. He based his motion on humanitarian grounds also, but he argued that time should be allowed for trying out military aeronautics. He stated that "existing balloons might injure inoffensive populations as well as combatants, and destroy a church as well as a battery; but that perfected balloons might diminish the length of a war, and consequently its evils, as well as the expenses caused by it." [2] Captain Crozier's prevision was justified by the action of the Second Conference, which renewed the Declaration, but only until the close of the Third Conference. The arguments in favor of a temporary restriction were repeated. Meanwhile the development of aerial navigation had proceeded to such a stage that many of the delegates refused to accept even a temporary prohibition.[3] A small minority only of the states participating in the

[2] The Two Hague Conferences, Hull, p. 78.

[3] The vote was: ayes, 29; noes, 8; abstentions, 7. The United States delegation voted aye; Germany and France, no; and Japan and Mexico abstained from voting.

Conference have ratified. In view of the remarkable development of military aeronautics, it is probable that there will be no further ratifications and that the Declaration will lapse with the close of the Third Conference. The prohibition, by its terms, is only binding when all of the belligerents are contracting Powers. Should a war occur between any two ratifying Powers during the life of the Declaration, they would be bound thereby for at least one year, since a denunciation cannot take effect before the expiration of that time. A remarkable state of affairs would obtain. When hostile aircraft met, the personnel might do little more than scowl at each other. Both land and naval forces might employ all kinds of fire against the enemy's aircraft, while the crew thereof would not be permitted to resort to a return fire of any kind. Such a ridiculous *dénouement* shows the fallacy of attempting to legislate in regard to methods of warfare that are undergoing evolution.

The discussion at the Second Hague Conference makes it clear that it was the intention to include bombardment by aircraft in the prohibition against the bombardment "*by any means whatever*" of undefended places.[4] When the prohibition against the discharge of projectiles and explosives from balloons lapses—or does not apply—aircraft will be permitted to undertake bombardments under the same restrictions as apply to land and maritime forces.[5] There is, however, one important point that is not clear. Both land and naval bombardments are continuations of *immediate* hostilities before certain places, whereas an aerial bombardment may be an isolated operation. Let us take a concrete case. Suppose the United States is at war with state "X." Land and naval forces are operating against Philadelphia, but as yet have not appeared before any other city. New York is technically defended, which it would be if its coast defenses were manned, even if no troops actually occupied the city. The "X" commander notifies the New York authorities that their city will be bombarded on or after noon the next day by an aerial fleet. Airships appear at noon and drop bombs on the Woolworth Building and the Stock Exchange. Is this legitimate

It is noteworthy that none of the Powers that have engaged in war since the close of the Second Conference—Turkey, Italy, Montenegro, Bulgaria, Greece, Roumania, and Mexico—is among the ratifiers.

[4] Art. 25, Annex, 4 H. C. (1907).

[5] Arts. 26 and 27, Annex, 4 H. C. (1907), and 9 H. C. (1907).

warfare? Yes, according to the letter; but no, according to the spirit of The Hague regulations. This ambiguity suggests the advisability of formulating a rule to the effect that the aerial bombardment of non-military plants or buildings should be permitted only when "defended' places are actually attacked or invested by land or maritime forces.

Both the First and the Second Hague Conferences adopted a rule that "persons sent in balloons to deliver dispatches, and generally to maintain communication between the various parts of an army or a territory" are not considered spies.[6] This provision is applicable to civilians as well as military persons. The same article provides that "military persons, who, not being in disguise, have penetrated into the zone of operations of the enemy's army, with a view to obtain information, are not to be considered spies." If we interpolate the words "or above" after the word "into," the altered rule will cover the accepted usage as to aerial reconnaissance. The "military persons" should be duly enrolled in belligerent service. In recent wars, belligerents have freely employed foreign aviators and their machines, both for reconnaissance and attack. It seems probable that in some cases, these foreigners were not regularly enrolled and uniformed. If so, they would not have been entitled to the treatment accorded prisoners of war, had they fallen into the hands of the adverse belligerents.

The Second Hague Conference adopted a rule, that in occupied territory, "all appliances, whether on land, at sea, or in the air, adapted to the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law * * * may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.[7] This provision extends the old *droit d'angarie* to neutral aircraft. There is no authority for seizing a foreign aircraft lawfully and casually in non-occupied belligerent territory, although a belligerent would not hesitate to confiscate such a craft if it should come into the jurisdiction of the belligerent state in violation of its municipal law.

The Declaration of London provides that "balloons and flying machines, and their distinctive component parts, together with accessories

[6] Art. 29, Annex, 4 H. C. (1907).
[7] Art. 53, Annex, 4 H. C. (1907).

and articles recognizable as intended for use in connection with balloons and flying machines" are regarded as "conditional contraband." [8] This provision, of course, was intended to apply only to aerial material transported as cargo—or part of a cargo—of a marine vessel.

Many of the regulations respecting the "Laws and Customs of War on Land" as adopted by the Second Hague Conference, will undoubtedly apply to aerial personnel operating over land or sea. The Conference recommended that—pending the adoption of regulations relative to the laws and customs of naval war—the Powers apply the principles of the conventions relating to war on land. Since aerial personnel and matériel are assigned either to the army or the navy, it follows that the regulations of land warfare, in so far as they are applicable, will be binding upon both army and navy aeronauts. The chapters dealing with "Prisoners of War" and "The Sick and Wounded" are applicable *in toto*. Other chapters may require slight additions or alterations to extend their application to warfare over and on the land and sea.

There are three leading propositions as to the basic "Law of the Air":

(1) The air is free, reserving to subjacent states the right to adopt such measures as are necessary for municipal and private security. This is in substance the principle advocated by M. Fauchille, adopted by the Institute of International Law in 1906 and in 1911, and by the Comité Juridique International de l'Aviation in 1910.

(2) The state is sovereign over the superincumbent air, but there is a right of innocent passage. This is Professor Westlake's view, presented to the Institute of International Law in 1906.

(3) The state has exclusive jurisdiction over the aerial space above its territory. This principle is supported by Professor George Grafton Wilson, Professor Zitelmann, Dr. Harold D. Hazeltine in his *Law of the Air*, and Dr. J. F. Lycklama in his *Air Sovereignty*.

Forceful arguments can be and have been adduced in favor of each of these propositions; but the third is to-day the accepted rule, because states have prescribed municipal regulations or entered into conventions that can be based on no other principle, and there have been no remonstrances from other states. These regulations were devised with a view to protect life and property, to enforce the customs, and to prevent

[8] Art. 24 and 24 (8).

espionage on military areas. The British Regulations of 1913 (under the Aerial Navigation Act of 1911) prohibit foreign aircraft from passing over any portion of the United Kingdom or territorial waters thereof, except on invitation and by permission of the government. Private foreign aircraft must obtain clearance papers from British consuls, and are permitted to land at certain prescribed places, where a permit must be obtained if the voyage is to be continued. They are forbidden to pass over military and naval districts. Anyone violating the regulations may be fired upon, and prosecuted by the courts. The penalty for espionage is seven years' imprisonment. A recent Franco-German convention provides that public aircraft may cross to the other state on special authorization only. If a military aircraft is forced across the frontier, it must descend at once and report to the nearest military authority. In these circumstances it may not be detained. Private aircraft may cross the frontier except in military districts.

While it is true that a state has exclusive jurisdiction over its air space, the jurisdiction is undoubtedly *latent* until the state assumes it by municipal regulation and proclamation. Foreign aeronauts are bound to observe such regulations at all times. While, in time of peace, the issuance of state regulations is a matter of no international concern, it is otherwise in time of war when a neutral state is within aerial-cruising distance of belligerent territory. It is then incumbent upon such state to define its attitude, especially as regards the passage of belligerent aircraft above its territory, because this is a mooted point. If, however, the state makes no proclamation, it would appear reasonable for belligerents to construe the failure in the light of their own interests. Hence, they might freely navigate such a neutral's air space so long as they did not land on his territory, nor engage in hostilities or other operations endangering subjacent life and property. A neutral state—proclamation or no proclamation—must intern a belligerent aircraft and personnel landing on the territory of such neutral state. A Hague regulation states: "A neutral power which receives on its territory troops belonging to the belligerent armies shall intern them. * * *"[9] It has generally been held that all war matériel brought in by belligerent personnel should also be detained until the end of the war. The subject of the

[9] Art. 11, 5 H. C. (1907).

navigation of neutral air space by belligerents is a vexed question that should be definitely settled at the next Hague Conference.

The military aircraft of each state should be marked in some characteristic way and the national color should be displayed as conspicuously as the construction of the aircraft permits, so that nationality can be determined at a distance. All aerial personnel should be regularly enrolled in the armed forces of the state, and properly uniformed. It has been suggested that some rule, analogous to that obtaining in maritime warfare, should be adopted for the transformation of private into public belligerent aircraft. The analogy is dubious, and no such rule is practicable or necessary. Transformation of aircraft is a very simple matter. All that is necessary is to secure the craft, enroll the personnel, and conform to the regulations adopted for public craft. States that are systematic in their military preparations register all private aircraft with a view to requisitioning them for war service. A continental belligerent can easily import large numbers of aircraft across its land frontiers. So too, importations will be freely made by sea, when the risk of capture by the enemy is not too great.

There is no doubt as to the general acceptance of the rule that hostilities, involving attack on or by aircraft, must be limited to belligerent territory and waters, the high seas, and the air space above such land and waters. In certain phases of aerial-land warfare, hostile aircraft are likely to meet above inhabited territory at some distance from a zone of belligerent operations. Such might be the case when cross-raids are undertaken, when the struggle for the supremacy of the air is going forward, or when reconnaissances are conducted before the hostile armies obtain contact. As a rule, these meetings will result in combat. In view of the fact that such aerial battles might seriously imperil subjacent life and property, it has been proposed that aerial combats should be restricted to the air space immediately above a zone of belligerent operations. It is hardly probable that a rule to this effect will be adopted, on account of the preponderance of military interests over humanitarian considerations. Again, artillery or infantry fire directed against aircraft maneuvering in three dimensions will necessitate high-angle fire, often approaching the vertical. This will imperil the attacker himself as well as non-combatant life and property in all directions within range.

Considering these facts, in connection with the rule that the aerial bombardment of all defended towns is permissible, it would seem that the whole of belligerent territory—especially the invaded territory—will in a way be placed on the firing line. Non-combatants in a danger zone will no longer be able to find comparative safety in cellars, because most of the projectiles will have a high angle of fall and all bombs and demolished aircraft will fall vertically, or nearly so. There will be no absolute security for life and property anywhere within the cruising radius of belligerent forces. A general realization of this fact may operate as a deterrent of war by causing the populations of embittered states to weigh more carefully than heretofore the grave question of hostilities.

As regards aerial-maritime combats, the belligerents may not engage in operations that involve the transit of projectiles through the air space above a neutral marginal sea, or the fall of projectiles or matériel thereinto. M. von Bar has proposed that aerial combats should not be permitted above the marginal sea of belligerents, except above the area of operations of a blockade, because neutral vessels, which have the right of innocent passage through such waters, might be endangered.[10] It is not probable that this rule will receive general sanction. Neutral vessels that navigate belligerent waters do so at their own risk, and navigation by them for any considerable distance through the marginal sea is such an exception as not to necessitate a modification of the old rule. As commercial vessels are not ordinarily permitted to engage in the coasting trade of a foreign state, they generally cut straight across a foreign marginal sea off the port of destination. During a naval combat, a merchant vessel, anywhere in the vicinity, can almost invariably escape danger by changing her course. This will not necessarily be so in the case of a supra-marine combat. M. von Bar has therefore proposed that aerial combats over the high seas should be restricted to a radius of 20 kilometers (12 miles) from the scene of a naval combat.[11] As in the case of aerial-land warfare, hostile aircraft may often meet at a much greater distance than twelve miles from a belligerent zone below, and it can hardly be expected that such an encounter will not result in

[10] Art. 2 and footnote to Art. 2 of the rules submitted by M. von Bar to the Institute of International Law in 1911.

[11] Art. 2 (b. 1) of the rules submitted to the Institute of International Law in 1911.

combat. Perhaps a more acceptable rule would be one providing that aerial personnel operating at a greater distance than twelve miles from a belligerent zone, must so conduct their operations as not to imperil neutral vessels; and that if any damage to neutral life and property *should* result, the case could be referred to the Permanent Court of The Hague for adjudication. Any such damage could only result from carelessness. It should not be more difficult for aerial craft to conduct their supra-marine hostilities without endangering innocent life and property than for coast artillery in time of peace to conduct their target practice seaward without imperiling shipping.

Many of The Hague regulations relative to "Means of Injuring the Enemy" [12] are also applicable to hostilities involving aircraft. The new warfare will, of course, bring in its train special devices to meet new conditions. To illustrate. While a belligerent aircraft should properly have distinctive markings and carry the national flag, it would be a legitimate ruse to seek to deceive the enemy by ascending to such a height as to render distinctive characteristics invisible from below. Owing to the difficulty belligerent personnel ashore and afloat will have in recognizing their own aircraft—especially when returning from a long flight,—special means of identifying them will be devised. These will generally consist of certain evolutions made in a definite way and order. They will, of course, be confidential, but an enterprising enemy will seek to discover and to employ them in order to deceive his adversary. An explosive incendiary bullet has recently been invented with the object of exploding the inflammable gas used to sustain an airship. The result of such an explosion would be comparable to that of a mine. Such a bullet penetrating the human body would probably cause frightful agony, unless death were instantaneous. Nevertheless, the bullet will probably not be barred, because it is not "*calculated* to cause unnecessary suffering." [13]

Although it has frequently been proposed to extend the marine league so as to include a total width of ten or twelve miles to accord with the range of modern cannon, there is no real necessity therefor; because, no matter how far extended, belligerents would not be permitted to join

[12] Section II, Chapter I, Annex 4 H. C. (1907).
[13] Art. 23 (e), Annex, 4 H. C. (1907).

battle in such a manner, that projectiles fell even within the outer edge of the extended marginal sea. There is no practical reason why a state in time of peace should care to control the sea for more than a marine league from its coast, and in time of war the exceptional case where such control is considered desirable could be provided for by a special rule. A wider marginal sea would only involve greater responsibilities without compensating advantages. No detailed information as to military dispositions can be gleaned from a marine vessel on the high seas just beyond the marine league, or, for that matter, within the marine league; but an aircraft at a considerably greater distance than a league could profitably observe such dispositions. For example: a foreign aviator five miles or more off Sandy Hook could observe every detail of our coast defenses located there. Great Britain has led the way by claiming jurisdiction over the air space above her marginal sea. If her object was to prevent espionage of coast military districts, she has not claimed a sufficient width of air space. It seems reasonable that a state should be permitted to exercise jurisdiction over sufficient air space seaward to prevent espionage. There is no relation, however, between the width of this space and that of the marginal sea, for the two widths are founded on entirely different considerations. A rule, therefore, should be formulated extending territorial air space the necessary distance seaward. Twenty kilometers (twelve miles) seem a reasonable limit. Von Bar's employment of that number as the limiting distance of an aerial combat from a naval combat has given the number a quasi-standing in international law, and it is probable that, by employing telescopic lenses, valuable observations could be made on coast defenses from that distance at sea. In special circumstances a belligerent state may find it desirable to establish a "defense" or "strategical" area off one of its ports in order to prevent espionage on its naval strength and dispositions. If the entire closure of such an area should seriously hamper commerce, it is customary to allow neutral vessels to pass through the zone at stated hours and by prescribed routes. The precedent for establishing such areas—extending them seaward, in some instances as far as ten miles—was set by Japan during the Russo-Japanese War of 1904.[14] It is fair to assume that such special jurisdiction has received the sanction of international

[14] International Law Situations, 1912, Naval War College, pp. 122–129.

law, for no remonstrances against the Japanese ordinances were filed. If it becomes necessary for a belligerent to assume maritime jurisdiction for a distance greater than a league from his coast in order to prevent espionage from marine vessels, there is no good reason why he should not assume jurisdiction over the air space for a distance of 12 miles (20 kilometers) further in order to prevent espionage from aircraft. The question of extending the seaward limit of aerial jurisdiction—general and special—is a matter of such importance to Powers within aerial-cruising range of one another as to require consideration at the next Hague Conference.

Some writers have attempted to extend to aerial craft the laws of maritime warfare relating to the treatment of commercial vessels. Such attempts lead to impracticable results and unnecessary complications. In return for the privileges granted to belligerents in the way of pre-empting air spaces over the high seas for hostilities, they should not be permitted to interfere in any way with neutral aircraft outside of such spaces, except perhaps to exercise a right of approach with a view of determining belligerent or non-belligerent character. It is neither practicable nor worth while for aircraft to engage in contraband trade, render unneutral service, or break blockade. As for the first, the amount of cargo that can be carried is negligible, and freights would be prohibitive. No form of unneutral service of any value—short of actual participation in hostilities—can be rendered by an aircraft. The transmission of information or dispatches by neutral carriers has lost whatever importance it ever had. Belligerent aircraft are better fitted for the task than private aircraft; and mail steamers, submarine cables, telegraph lines, and radiotelegraphy offer still better facilities. The transportation of military persons by neutral aircraft on behalf of a belligerent would be as foolhardy as unnecessary under the conditions of modern warfare. The question has been debated as to whether, under the Declaration of London, a blockade can be effective unless the blockading fleet prevents access to the enemy coast by aircraft. There is no doubt that the delegates to the London Conference had in mind access by marine vessels only, and hence a prize court would probably hold that aerial access would not invalidate the blockade. However, no Power will in the future attempt a blockade unless one or more vessels carry hydro-aeroplanes

in sufficient number to punish attempts to enter the air space above the area of blockade.

It has been held that a private aircraft which is captured at sea, must be sent in with its personnel to a prize court for adjudication.[15] This assumption is obviously based on the rule that *all* private property captured at sea by a belligerent war vessel must be adjudicated by a national prize court; but all precedents deal with the capture of marine vessels only, and the *reason* for the rule was the protection of innocent commerce. However, if there is any doubt as to what procedure should be followed, aircraft and their personnel should, by international convention, be specifically excluded from prize court jurisdiction, this for three reasons. First: Since no neutral commerce is involved, the question to be decided is whether or not there has been an intrusion by neutrals into belligerent operations at sea. Army tribunals deal with such questions on land, and there is no reason why naval tribunals cannot be entrusted with the same powers. Second: If captured neutral aeronauts believe they have been treated too severely, or that the capture took place beyond the limits of belligerent jurisdiction, the matter could be taken up by the neutral government concerned by diplomatic representation, or by presenting its claims to the Permanent Court of Arbitration at The Hague. Third: It is not, in general, practicable to send an aircraft into a prize court. In most cases, the craft will be wrecked when it falls into the hands of a naval force, and nothing can be done with it except to abandon it or stow the wreckage on a war vessel, where space is precious. If the craft is not wrecked, it will probably be beyond cruising distance of one of the belligerent's home ports. If it is within cruising distance, who will navigate it,—the captured personnel placed on their honor, or a prize crew of sailors unacquainted with aircraft in general, and foreign ones in particular? And finally there will be no "papers" for a court to pass on.

The attempt to carry into the air the laws of contraband, unneutral service, and blockade might lead to results detrimental to humanitarian interests. The rule that neutral vessels may render assistance to belligerents, without incurring any penalty beyond the condemnation of the property involved, is unfortunately entrenched in international law.

[15] See International Law Situations, 1912, pp. 90–91.

It would be a step decidedly backwards to extend this rule to assistance rendered by neutral aircraft, for we have a better rule, *viz.*, that an aircraft, which enters a belligerent air space, does so at its peril.

The following rules in regard to pre-empted air spaces above the high seas are suggested as a basis for discussion:

1. Belligerents are permitted to establish the following prohibited air spaces above the high seas: (a) for a distance of 20 kilometers from the coast line of belligerent territory; (b) for a distance of 20 kilometers from the seaward margin of a maritime or strategic area; (c) for a radius of 20 kilometers from the scene of a naval combat; and (d) above the area of operations of a blockade.

2. Neutral aircraft which enter prohibited air spaces do so at their peril. Any intruding craft may be fired upon after due warning, or captured. Liability to capture or attack does not extend beyond a prohibited air space and subjacent waters. A captured air craft may be confiscated and its personnel detained and punished according to the nature of their offense, unless it be shown that the aircraft entered the prohibited air space through ignorance, or was driven into it by stress of weather or by other form of *vis major*. In all cases of innocent intrusion, matériel will be restored as far as practicable, and all personnel will be liberated.

3. No neutral aircraft will be confiscated, nor will any personnel thereof be detained and punished, except by the judgment of a duly-constituted naval tribunal.

4. Belligerents have no jurisdiction whatever over neutral aircraft outside of prohibited air spaces, except that they may exercise a right of approach for the purpose of determining nationality.

In conclusion, I desire to invite attention to two comprehensive principles which, I trust, have been established by this discussion. First: Owing to the fact that there is no international air commerce and that aircraft must be based on land,—or exceptionally on marine vessels —the laws of neutrality have no application to aerial-maritime warfare; there are laws of *war* only. Second: If we regard pre-empted zones and air spaces at sea as belligerent domain,—which they are in fact for the nonce—the laws of aerial-land and of aerial-maritime warfare are practically the same.

WILMOT E. ELLIS.

THE DECLARATION OF LONDON OF FEBRUARY 26, 1909

Two projects for the creation of an international prize court were laid before the Second Hague Peace Conference on the same day (June 22, 1907) one by the German and one by the British delegation. The United States at the time and France later warmly approved the proposed institution, and a joint project in the nature of a compromise was drafted and presented to the Conference by the four Powers, which, after much debate, prolonged discussion, opposition on the part of some delegations and hesitation on the part of others, was adopted with some amendments by the Conference and forms what is known as the Convention Relative to the Establishment of an International Prize Court of October 18, 1907.[1] Although signed by thirty-three Powers, the court contemplated by the convention has not been established by reason, it would seem, of objections raised by Great Britain to Article 7 of the convention, to remedy which a conference of leading maritime nations was called by Great Britain to agree upon important principles of law to be applied by the court, when constituted, in the decision of certain classes of prize cases. In this conference, known as the International Naval Conference, held at London from December 4, 1908, to February 26, 1909, representatives of Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, The Netherlands, Russia, and Spain participated. An agreement, called the Declaration of London, dated February 26, 1909,[2] upon the principles of law to be applied by the proposed court, in accordance with Article 7 of the original convention, was reached. Like the original convention, it was also in the nature of a compromise. It met with the approval of the British Government, for it was signed by the delegates of that government acting under instructions, as is the wont of diplomatic conferences, and it seemed at the time that it removed the objections to the ratification of the original

[1] Printed in SUPPLEMENT to this JOURNAL, Vol. 2, p. 174.

[2] *Ibid.*, Vol. 3, p. 184.

convention and to the establishment of the Prize Court in so far as Great Britain was concerned. The government considered it satisfactory and introduced a bill in both Houses of Parliament, modifying British practice in such a way as to meet the requirements of the Prize Court Convention, as modified by the Declaration of London. It passed the House of Commons, but failed in the House of Lords, owing to the unexpected, bitter and persistent opposition on the part of the public, so that the government has up to the spring of 1914 ratified neither the Hague Convention nor the Declaration of London. The signatories of the original convention and of the Declaration have waited, and are still waiting, for favorable action by Great Britain upon these two international documents, apparently unwilling to create the International Prize Court without the co-operation of Great Britain, and to bind themselves by the provisions of the Declaration framed by a conference called by Great Britain to meet British objections, unless it be ratified by Great Britain. The establishment of the Prize Court, therefore, is thus made to depend upon the action of Great Britain.

Partisans of the judicial settlement of international disputes are discouraged by the delay in creating the first international court in the technical sense of the work, and the friends of the Hague Conference are worried by the failure of Great Britain to pass the legislation necessary to establish the court, because various Powers, it would seem, hesitate to take part in a third conference at The Hague, which it has been expected would meet in 1915, until this important convention of the Second Conference has been carried into effect. In view of these circumstances it seems advisable to point out the objections raised to the original Prize Court Convention, to analyse the provisions of the Declaration of London, and to consider the reasons which militate against its acceptance by Great Britain, for the failure to ratify these instruments not only prevents the establishment of the proposed court, but blocks the Third Hague Conference.

OBJECTIONS TO THE INTERNATIONAL PRIZE COURT CONVENTION

Let us first consider the objections to the convention. It should be said that Great Britain was not the only country opposed to the convention in its original form. The United States shared to a considerable

degree the doubts and scruples of Great Britain as to Article 7, but not to the extent of making its modification a condition precedent to its acceptance. The American Government felt that it could ratify the convention notwithstanding its disapproval of Article 7, if Great Britain should do so. The objection of the United States was of a different nature and has fortunately been met by the Powers in a large and generous spirit, so that the United States stands ready to co-operate with them in the establishment of the court, whenever Great Britain is in a position to ratify the convention. The convention in its third article contemplates an appeal from the decisions of national courts in matters of prize to the proposed International Prize Court, with the result that a decision of the Supreme Court of the United States might be reversed on appeal. Many lawyers believed that this provision of the convention was inconsistent with the Constitution of the United States, which provides in Article III, Section 1, that "the judicial power of the United States shall be vested in one Supreme Court," and that an appeal in the strict and technical sense of the word to the International Prize Court would deprive the Supreme Court of its final authority in judicial matters. It may be said that the United States, while possessing power to pass upon questions of international law affecting it or its States, does not possess the power to decide finally questions of international law affecting foreign nations, its citizens or subjects, and that each nation possesses the same right as the United States to pass upon an international question affecting it. As no nation has renounced its right in favor of the United States, it is evident that the framers of the American Constitution could only invest the Supreme Court with the power to decide questions which the United States possessed as a member of the society of nations. While this is true in general, it is especially true in prize cases, which are international in character and are settled by international, not by municipal law. Indeed, the great Lord Stowell was accustomed to say that he administered international law, not the law of England, and he maintained the doctrine, truer in theory than in fact, that the Court of Admiralty which he graced for so many years, was an international, not a municipal court. But whether this be true or not, the fact is that foreign nations have always claimed and have constantly exercised the right to protest prize decisions and to have them finally

settled either by diplomacy or by mixed commissions or temporary tribunals, of which latter procedure a most successful instance was the commission between Great Britain and the United States, created by the seventh article of the Jay treaty of 1794. It has never been alleged that this commission sitting at London violated the Constitution of the United States, and it is difficult to see how a court in the settlement of similar cases and likewise sitting in a foreign country—Holland—can be unconstitutional merely because it is permanent instead of created for the special occasion. It may also be mentioned in this connection that the practice inaugurated by the Jay treaty has been generally followed; that the United States has frequently submitted to such commissions or tribunals upon the request of foreign nations, particularly of Great Britain, international questions decided by its Supreme Court to which objection is taken by foreign nations, and that the awards of such commissions and tribunals, inconsistent with the decision of the Supreme Court, have been accepted and complied with by the United States. The proposed court, it would seem, is therefore not to be considered as a court in the national sense, or, at any rate, that it is not a court in the sense of the Constitution of the United States. A single example will make this clear. The case of the *Circassian* (2 Wallace, 135) decided by the Supreme Court of the United States in 1864, to the effect that a blockade is not raised by land occupation of the port was strenuously objected to by Great Britain, with the result that the question was submitted to the Anglo-American Mixed Claims Commission of 1872. The Commission, after considering the judgment of the court, decided in favor of the claimants,[3] and the United States paid the award.[4] For practical purposes, this was an appeal from and a reversal of a judgment of the Supreme Court by a mixed commission, although, technically speaking, it may be said that only the question involved in the decision was submitted, not the decision itself, and that the judgment was not technically reversed,—a view apparently followed by the Supreme Court, in the case of the *Adula* (176 U. S., 361) arising out of the recent Spanish-American War.

[3] 4 Moore's Arbitrations, pp. 3911–3923.

[4] Foreign Relations of the United States, 1874, pp. 570–572; *ibid.*, 1875, Pt. I, p. 655.

But be this as it may, the United States was unwilling to bind itself to submit decisions of its Supreme Court to the proposed International Prize Court for confirmation or reversal, and Mr. Root took advantage of the meeting of the London Naval Conference to propose an amendment to the original convention to obviate this difficulty and to permit the United States to ratify it without involving the prestige of the Supreme Court or questioning its international, as well as its national, supremacy under the Constitution of the United States. Pursuant to express instructions, the American delegates to the Naval Conference, therefore, proposed that

> Any signatory of the Convention for the establishment of an International Court of Prize, signed at The Hague on October 18, 1907, may provide in the act of ratification thereof, that, in lieu of subjecting the judgments of the courts of such signatory Powers to review upon appeal by the International Court of Prize, any prize case to which such signatory is a party shall be subject to examination *de novo* upon the question of the captor's liability for an alleged illegal capture, and, in the event that the International Court of Prize finds liability upon such examination *de novo*, it shall determine and assess the damages to be paid by the country of the captor to the injured party by reason of the illegal capture.[5]

The Conference, however, deemed the proposed modification beyond its scope. It approved the alternative procedure proposed by the United States, but remitted the question to the signatories of the convention, as appears from the following voeu:

> The delegates of the Powers represented at the naval conference which have signed or expressed the intention of signing the convention of The Hague of the 18th October, 1907, for the establishment of an international prize court, having regard to the difficulties of a constitutional nature which, in some states, stand in the way of the ratification of that convention in its present form, agree to call the attention of their respective governments to the advantage of concluding an arrangement under which such states would have the power, at the time of depositing their ratifications, to add thereto a reservation to the effect that resort to the international prize court in respect of decisions of their national tribunals shall take the form of a direct claim for compensation, provided always that the effect of this reservation shall not be such as to impair the rights secured under the said convention either to individuals

[5] Treaties, Conventions, etc., between the United States of America and other Powers, Vol. III, compiled by Garfield Charles, p. 331.

or to their governments, and that the terms of the reservation shall form the subject of a subsequent understanding between the Powers signatory of that convention.[6]

Accordingly Mr. Knox, then Secretary of State, addressed a circular identic note, dated October 18, 1909,[7] to the signatory Powers, urging the modification of the convention, in the sense of Mr. Root's proposal, and as the result of negotiations an agreement, called the Additional Protocol, was signed at The Hague on September 19, 1910, the material portion of which is as follows:

> The Powers signatory or adhering to The Hague Convention of October 18, 1907, relative to the establishment of an international court of prize, which are prevented by difficulties of a constitutional nature from accepting the said convention in its present form, have the right to declare in the instrument of ratification or adherence that in prize cases, whereof their national courts have jurisdiction, recourse to the international court of prize can only be exercised against them in the form of an action in damages for the injury caused by the capture (Art. 1).
>
> In the case of recourse to the international court of prize, in the form of an action for damages, Article 8 of the convention is not applicable; it is not for the court to pass upon the validity or the nullity of the capture, nor to reserve or affirm the decision of the national tribunals.
>
> If the capture is considered illegal, the court determines the amount of damages to be allowed, if any, to the claimants (Art. 2).[8]

The Additional Protocol, signed by thirteen Powers, has since been approved by every signatory or adherent, and the original convention and the Additional Protocol, which by Article 9 thereof is made an integral part of the convention, to be ratified at one and the same time with it, were advised and consented to by the Senate of the United States on February 15, 1911. It should be said in this connection that the Declaration of London was likewise advised and consented to by the Senate on April 24, 1912, so that the United States stands ready to deposit the ratifications of the Prize Court Convention and of the Declaration of London, and thus to co-operate in the establishment of the proposed International Prize Court, when the other Powers shall be in a position to take such action.

[6] Treaties, Conventions, etc., Vol. III, p. 325.
[7] Supplement to this JOURNAL, Vol. 4, p. 102.
[8] Treaties, Conventions, etc., Vol. III, p. 263.

Let us now consider the British objection to the original convention. It has been stated that objections on the part of Great Britain to Article 7 of the Prize Court Convention delayed its ratification and caused this Power to call a conference of leading maritime nations to overcome British objections. As Article 7 was the storm center, although it was not the only objection to the convention, its material portion is quoted:

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a power which is itself or whose subject or citizen is a party to the proceedings, the court is governed by the provisions of the said treaty.

In the absence of such provisions, the court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity.

The text of this article, which has been bitterly criticized—indeed, one might say, held up to public execration by its opponents in Great Britain, was proposed by the British delegation and is contained in Article 6 of the British project of the Prize Court laid before the Second Hague Conference, and ultimately adopted as Article 7 of the convention, after much discussion and with trifling changes of phraseology. The article in its original form reads as follows:

If the question of law to be decided has already been settled by a convention, of which the parties in controversy are signatories, the decision of the court shall be in conformity with the stipulations of the convention.

In the absence of a convention, if all civilized nations are found to be in accord upon a point of law, the court shall likewise deliver its judgment in conformity with this general opinion.

When these conditions do not exist, the court shall render judgment by applying the principles of international law.[9]

[9] Si la question juridique à décider a déjà été réglée par une convention dont les Puissances en litige sont signataires, la décision de la cour sera conforme aux stipulations de la convention.

A défaut d'une convention, si toutes les nations civilisées se trouvent être d'accord sur un point juridique, la cour devra également rendre un arrêt conforme à cette opinion générale.

Où ces conditions n'existent pas la cour rendra sa décision en appliquant les principes du droit international. Actes et Documents, 2eme Conférence de la Pâix, Vol. 2, pp. 1076–7.

It is the custom of international conferences to appoint a reporter, whose duty it is to prepare a report on the convention and its various provisions, which report is read by the members, subjected to criticism, and often modified to meet their objections. It is thus an official document and, whether it be regarded as adopted or not with the convention which it explains and interprets, it is nevertheless looked upon as possessing a peculiar, if not an official, authority. The report on the Prize Court Convention, written for the Conference by the distinguished French publicist, Louis Renault, is justly regarded as a masterpiece, and he thus comments upon Article 7:[9a]

What rules of law will the new Prize Court apply?

This is a question of the greatest importance, the delicacy and gravity of which can not be overlooked. It has often claimed the attention of those who have thought of the establishment of an international jurisdiction on the subject we are considering.

If the laws of maritime warfare were codified, it would be easy to say that the International Prize Court, the same as the national courts, should apply international law. It would be a regular function of the international court to revise the decisions of the national courts which had wrongly applied or interpreted the international law. The international courts and the national courts would decide in accordance with the same rules, which it would be supposed ought merely to be interpreted more authoritatively and impartially by the former courts than by the latter. But this is far from being the case. On many points, and some of them very important ones, the laws on maritime warfare are still uncertain, and each nation formulates them according to its ideas and interests. In spite of the efforts made at the present Conference to diminish these uncertainties, one can not help realizing that many will continue to exist. A serious difficulty at once arises here.

It goes without saying that where there are rules established by treaty, whether they are general or are at least common to the nations concerned in the capture (the captor nation and the nation to which the vessel or cargo seized belongs), the International Court will have to conform to these rules. Even in the absence of a formal treaty, there may be a recognized customary rule which passes as a tacit expression of the will of the nations. But what will happen if the positive law, written or customary, is silent? There appears to be no doubt that the solution dictated by the strict principles of legal reasoning should prevail. Wherever the positive law has not expressed itself, each belligerent has a

[9a] The full text of the report is printed in the Supplement to this number of the JOURNAL, pp. 88–144.

right to make his own regulations, and it can not be said that they are contrary to a law which does not exist. In this case, how could the decision of a national prize court be revised when it has merely applied in a regular manner the law of its country, which law is not contrary to any principle of international law? The conclusions would therefore be that in default of an international rule firmly established, the International Court shall apply the law of the captor.

Of course it will be easy to offer the objection that in this manner there would be a very changeable law, often very arbitrary and even conflicting, certain belligerents abusing the latitude left them by the positive law. This would be a reason for hastening the codification of the latter in order to remove the deficiencies and the uncertainties which are complained of and which bring about the difficult situation which has just been pointed out.

However, after mature reflection, we believe that we ought to propose to you a solution, bold to be sure, but calculated considerably to improve the practice of international law. "If generally recognized rules do not exist, the court shall decide *according to the general principles of justice and equity.*" It is thus called upon to *create the law* and to take into account other principles than those to which the national prize court was required to conform, whose decision is assailed by the International Court. We are confident that the judges chosen by the Powers will be equal to the task which is thus imposed upon them, and that they will perform it with moderation and firmness. They will interpret the rules of practice in accordance with justice without overthrowing them. A fear of their just decisions may mean the exercise of more wisdom by the belligerents and the national judges, may lead them to make a more serious and conscientious investigation, and prevent the adoption of regulations and the rendering of decisions which are too arbitrary. The judges of the International Court will not be obliged to render two decisions contrary to each other by applying successively to two neutral vessels seized under the same conditions different regulations established by the two belligerents. To sum up, the situation created for the new Prize Court will greatly resemble the condition which long existed in the courts of countries where the laws, chiefly customary, were still rudimentary. These courts made law at the same time that they applied it, and the decisions constituted *precedents*, which become an important source of the law. The most essential thing is to have judges who inspire perfect confidence. If, in order to have a complete set of international laws, we were to wait until we had judges to apply it, the event would be a prospective one which even the youngest of us could hardly expect to see. A scientific society, such as the Institute of International Law, was able, by devoting twelve years to the work, to prepare a set of international regulations on maritime prizes in which the organization and the procedure of the International Court have only a very limited scope. The Community of civilized nations is more difficult to set on foot than

an association of jurisconsults; it must be subject to other considerations or even other prejudices, the reconcilement of which is not so easy as that of legal opinions. Let us therefore agree that a court composed of eminent judges shall be entrusted with the task of supplying the deficiencies of positive law until the codification of international law regularly undertaken by the governments shall simplify their task.[10]

Let us now examine the two paragraphs of Article 7, previously quoted, as officially explained and interpreted by Professor Renault. There can be no doubt, and there should be no difference of opinion, that when the parties in controversy have settled in advance of the capture the law by which its legality is to be tested, by formal convention or other international agreement, the proposed court should apply the conventional law, because it was recognized or created by the parties for this express purpose. It is equally clear that in the absence of an express convention or agreement between the parties, the court should apply the rules of international law, whether these rules be found in international agreements to which the nations at large are parties, or whether they are only recognized in and evidenced by the practice of nations. But it often happens—and this case is covered by Article 7—that no generally recognized rule exists or, what amounts practically to the same thing, that the interpretation by one nation of an existing rule or of a rule which is claimed to exist differs from the interpretation of another nation. A friendly critic of this article, the late Professor Westlake, enumerated certain of these differences in the following passage:

> Is the notice of blockade, to which a ship desiring to enter a blockaded port is entitled, to be measured by the British or French rules? Is conditional contraband to be allowed? Does the declaration of the commander of a neutral convoy exclude the right of search? These and many others are questions on which it cannot be said that any rules are generally recognized.[11]

Mr. Westlake pertinently asks if they are to be left to the International Prize Court, "to deal with as if they had never been raised before they came before it, as writers belonging to the school of the Law of Nature and Nations would have done? Or is it meant that a wholly

[10] Actes et documents, Vol. I, p. 190.
[11] Westlake, International Law, Part 2, pp. 293–294.

different class of considerations may be taken into account?" [12] His opinion was that the national judgment is that "justice and equity will forbid its reversing when it was founded on a view of international rights seriously entertained by the state in question, and not ousted by stipulation or general recognition to the contrary." [13] That is to say, in the absence of a conventional or customary rule of international law, the national decision should not be reversed by the proposed court on appeal, because the national court was clearly within its province in deciding a question according to its sense of justice and equity. He recognized that such action would lessen the jurisdiction of the proposed court, but he was of the opinion that "an international prize court would still have great functions to perform and would, in our judgment, be a valuable improvement on the present system." [14] But such a limitation upon the jurisdiction of the court is in the teeth of Article 7 and irreconcilable with the views of the Conference as above expressed by Mr. Renault when he said that the court was to make the law which it professed to interpret and the judges were to be invested with the functions of an international legislature.

Great Britain, whose delegates to the Conference had proposed the solution in question, refused, under the pressure of public opinion, to ratify their action, although it is to be presumed that the delegates acted at the time under instructions from or with the full concurrence of their government; for by ratifying it would have entrusted the rights and duties of Great Britain both as a neutral and as a belligerent to a court composed of fifteen judges, only two of whom were appointees of Great Britain and the United States and who accepted Anglo-American practice on these points. That nations in controversy could determine the law to be applied by a permanent or temporary tribunal, when the law was held to be non-existent or its interpretation doubtful or divergent, was evident by the Treaty of Washington of May 8, 1871, which adopted and prescribed the so-called three rules of Washington for the decision of the controversies arising out of the Alabama claims.

[12] Westlake, International Law, Part, 2, p. 294.
[13] *Ibid.*, p. 294.
[14] *Ibid.*, p. 296.

THE INTERNATIONAL NAVAL CONFERENCE

The British Government, therefore, decided to call a Conference of leading maritime nations to agree upon rules to determine the law "where no generally recognized rule exists," in order to withdraw from the court the right conferred upon it by Article 7 of the convention to "give judgment in accordance with the general principles of justice and equity." On February 27, 1908, Sir Edward Grey, His Majesty's Principal Secretary of State for Foreign Affairs, invited Germany, the United States, Austria-Hungary, Spain, France, Italy, Japan, Russia, and subsequently, by general agreement, Holland, to hold a conference in London, in order to reach "an agreement as to what are the generally recognized principles of international law, within the meaning of paragraph 2 of Article 7 of the convention, as to those matters wherein the practice of nations has varied, and of then formulating the rules which, in the absence of special treaty provisions applicable to a particular case, the court should observe in dealing with appeals brought before it for decision."

Continuing, the invitation read:

> The questions upon which His Majesty's Government consider it to be of the greatest importance that an understanding should be reached are those as to which divergent rules and principles have been enforced in the prize courts of different nations. It is therefore suggested that the following questions should constitute the programme of the conference:
>
> (a) Contraband, including the circumstances under which particular articles can be considered as contraband; the penalties for their carriage; the immunity of a ship from search when under convoy; and the rules with regard to compensation where vessels have been seized but have been found in fact only to be carrying innocent cargo;
>
> (b) Blockade, including the questions as to the locality where seizure can be effected, and the notice that is necessary before a ship can be seized;
>
> (c) The doctrine of continuous voyage in respect both of contraband and of blockade;
>
> (d) The legality of the destruction of neutral vessels prior to their condemnation by a prize court;
>
> (e) The rules as to neutral ships or persons rendering "unneutral service" ("assistance hostile");
>
> (f) The legality of the conversion of a merchant-vessel into a war-ship on the high seas;

(g) The rules as to the transfer of merchant-vessels from a belligerent to a neutral flag during or in contemplation of hostilities;

(h) The question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property.

His Majesty's Government are deeply sensible of the great advantage which would arise from the establishment of an International Prize Court, but in view of the serious divergences which the discussion at The Hague brought to light as to many of the above topics after an agreement had practically been reached on the proposals for the creation of such a court, it would be difficult, if not impossible, for His Majesty's Government to carry the legislation necessary to give effect to the convention unless they could assure both Houses of the British Parliament that some more definite understanding had been reached as to the rules by which the new tribunal should be governed.

If the programme outlined above is concurred in by the government to which you are accredited, it would be convenient if, on some subsequent date, as for instance the 1st August, the governments were to interchange memoranda setting out concisely what they regard as the correct rules of international law on each of the above points, together with the authorities on which that view is based. This course would greatly facilitate the work of the conference, and materially shorten its labours.[15]

The nations invited accepted the invitation, exchanged the desired memoranda, and their representatives met at London December 4, 1908, and remained in session until February 26, 1909, when the Conference adjourned, leaving behind it as a perpetual memorial of its labors the Declaration of London. The Conference wisely limited its labors to the topics announced in the call, and on six of the eight subjects reached acceptable conclusions. Two matters—convoy and the right of visit and search—were not specifically mentioned in the program, but were so incidental to its subject-matter that they properly find a place in the Declaration.

BLOCKADE

In discussing blockade, the Conference excluded the so-called pacific blockade, a recent comer in international law, but destined, it would seem, to stay. The blockade of actual war alone was considered. The right of blockade, as laid down in the leading case of the *Franciska*:—

[15] British parliamentary paper, Miscellaneous, No. 5 (1909), p. xix.

is founded not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of the belligerents during war all the trade that was open to him in times of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, *viz.*, that a neutral has no right to interfere with the military operations of a belligerent, either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded.[16]

But it must not be forgotten that blockade is an extreme right and allowed merely for a definite military purpose, namely, to reduce the enemy by cutting him off from the outer world. Therefore, blockade should be limited to its purpose and should not be extended beyond the sphere of military operations, and should, so far as possible, not interfere with the legitimate right of neutral trade and commerce. There is perhaps no better statement of the belligerent's rights and their necessary restriction in the interest of neutrals than the following apt statement of Mr. Cass, when Secretary of State:

The blockade of an enemy's coast, in order to prevent all intercourse with neutrals, even for the most peaceful purpose, is a claim which gains no additional strength by an investigation into the foundation on which it rests; and the evils which have accompanied its exercise call for an efficient remedy. The investment of a place by sea and land with a view to its reduction, preventing it from receiving supplies of men and material necessary for its defense, is a legitimate mode of prosecuting hostilities, which cannot be reasonably objected to so long as war is recognized as an arbiter of national disputes. But the blockade of a coast, or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceable and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times. To watch every creek and river and harbor upon an ocean frontier in order to seize and confiscate every vessel with its cargo attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates, if now first presented for consideration.[17]

[16] 10 Moore's Privy Council, 37, 50 (1855).

[17] Wharton, International Law Digest, Vol. 3, section 361.

A port may be besieged by land or blockaded by water, or may be invested by land and water at one and the same time. A very careful and authoritative writer, Major General Halleck, has summed up Anglo-American practice within the compass of a paragraph:

> Blockades are divided, by English and American publicists, into two kinds: (1) A simple or *de facto* blockade, and (2) a public or governmental blockade. This is by no means a mere nominal distinction, but one that leads to practical consequences of much importance. In cases of capture, the rules of evidence which are applicable to one kind of blockade, are entirely inapplicable to the other; and what a neutral vessel might lawfully do in case of a simple blockade, would be sufficient cause for condemnation in case of a governmental blockade. A simple or *de facto* blockade is constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts, it ceases when they terminate; its existence must, therefore, in all cases be established by clear and decisive evidence. The burthen of proof is thrown upon the captors, and they are bound to show that there was an actual blockade at the time of the capture. If the blockading ships were absent from their stations at the time the alleged breach occurred, the captors must prove that it was accidental, and not such an absence as would dissolve the blockade. A *public*, or governmental blockade, is one where the investment is not only actually established, but where also a public notification of the fact is made to neutral Powers by the government, or officers of state, declaring the blockade. Such notice to a neutral state is presumed to extend to all its subjects; and a blockade established by public edict is presumed to continue till a public notification of its expiration. Hence the burthen of proof is changed, and the captured party is now bound to repel the legal presumptions against him by unequivocal evidence. It would, probably, not be sufficient for the neutral claimant to prove that the blockading squadron was absent, and there was no actual investment at the time the alleged breach took place; he must also prove that it was not an accidental and temporary absence, occasioned by storms, but that it arose from causes which, by their necessary and legal operation, raised the blockade.[18]

As municipal law does not forbid neutral trade with a blockaded port, although the law of nations undoubtedly does subject neutral property in such a case to capture and confiscation,[19] it is of great importance to

[18] Moore, Digest of International Law, Vol. VII, p. 783, quoting Halleck, Int. Law (3d ed. by Baker), Vol. II, p. 186.

[19] "It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that, to carry on trade with a blockaded port, is or ought to be a

the neutral to know the precise moment when a venture lawful by municipal law becomes illegal by international law. The blockade must be legally binding, because it is by virtue of the blockade that neutral property becomes liable to seizure; and it is equally obvious that the neutral must be taxed with knowledge of the blockade, otherwise we have an offense in international law without a criminal intent, and finally there must be some act done in furtherance of the intent formed or existing to violate the blockade.

In the language of a great authority, Lord Stowell, whose decisions form the Golden Book of prize law, "on the question of blockade three things must be proved: (1), the existence of an actual blockade; (2), the knowledge of the party; and (3), some act of violation, either by going in, or by coming out with a cargo laden after the commencement of blockade." [20] If we add an "attempt" to violate the blockade, the definition is as complete and accurate as possible within a few lines.

The blockade must be actual as distinct from fictitious, maintained by a force in position, not by an inhibition on paper, so that the entry is blocked and the attempt to enter dangerous. To quote another distinguished authority, Sir William Grant,

> The intention to shut up the port should not only be generally made known to the vessels navigating the seas in the vicinity, but it was the duty of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island.[21]

A later admiralty judge has thus expressed himself:

> The maintenance of a blockade must always be a question of degree,—of the degree of danger attending the ships going into or leaving a blockaded port. Nothing is further from my intention, nor, indeed, more opposed to my notions of the Law of Nations, than any relaxation of the rule that a blockade must be efficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or

municipal offense by the law of nations."—Per Dr. Lushington in *The Helen*, 1865, L. R. 1 Ad. & Ecc. 1.

[20] *The Betsey*, 1 C. Robinson (1798).

[21] *The Nancy*, 1 Acton, 57 (1799).

violent winds, or occasional absence; that it is most difficult to judge from numbers alone. Hence, I believe that in every case the inquiry has been whether the force was competent and present, and if so, the performance of the duty was presumed; and I think I may safely assert, that in no case was a blockade held to be void when the blockading force was on the spot or near thereto, on the ground of vessels entering into or escaping from the port, where such ingress or egress did not take place with the consent of the blockading squadron.[22]

The language of the courts was not always the practice of the admirals, and the undoubted right of blockade was perhaps more honored in the breach than in the observance. The history of blockade is largely a chronicle of abuse. It was easy and therefore of frequent occurrence, to announce that on and after such a day certain ports of the enemy, or perhaps the whole coast was closed to neutral commerce, and that any neutral vessel setting sail for the specified region would be lawful prize. It was, however, difficult to make this paper blockade good and effective in fact. The Continental wars, springing out of the French Revolution, were periods of disorganization in which the armed hand blotted out even the semblance of right. Paper blockade was answered by paper blockade, until neutral commerce was either driven from the seas, or the neutral, harassed beyond endurance by decree and counter-decree, and finding embargoes and non-intercourse powerless to redress a series of wrongs and outrages, aggravated by impressment of its seamen, grasped the sword in self-defense as the only means of maintaining its just rights.

The fictitious blockades proclaimed by Great Britain and made the pretext for violating the commerce of neutral nations have been one of the greatest abuses ever committed on the high seas. During the late war they were carried to an extravagance which would have been ridiculous, if in their effects they had not inflicted such serious and extensive injuries on neutral nations. Ports were proclaimed in a state of blockade previous to the arrival of any force at them, were considered in that state without regard to intermissions in the presence of the blockading force and the proclamations left in operation after its final departure; the British cruisers during the whole time seizing every vessel bound to such ports, at whatever distance from them, and the British prize courts pronouncing condemnations wherever a knowledge of the proclamation at the time of sailing could be presumed, although it might afterwards

[22] Per Dr. Lushington in *The Franciska*, 2 Spinks, Ecclesiastical and Admiralty Reports (1855), 113, 128.

be known that no real blockade existed. The whole scene was a perfect mockery in which fact was sacrificed to form and right to power and plunder. The United States were among the greatest sufferers; and would have been still more so, if redress for some of the spoliations proceeding from this source had not fallen within the provisions of an article in the Treaty of 1794.[23]

The abuse of the system led the Congress of Paris in 1856 to declare that "blockades in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prohibit access to the enemy's coast." But the Declaration of Paris, in proclaiming effectiveness as a requirement of international law, left untouched and unsolved other and necessary parts of the problem. How is the effective blockade to be declared to the neutral nations and brought to the actual or constructive notice of the neutral shipper? Is the effective blockade violated by an attempt in the teeth of the blockading squadron, or is the intent to violate the blockade formed many miles distant in the home port sufficiently manifested to permit capture upon the high seas before an actual attempt has been made to break the blockade and enter the port? Is the ultimate destination of the cargo, as in the case of contraband, determinative, so that transfer of cargo at a neutral port is without legal effect, provided the ultimate intent be to violate the blockade? Does the blockade when officially announced and proclaimed continue until it is officially removed, irrespective of the fact that the blockade has in fact ceased to exist?

These and other important questions were not settled by the Declaration of Paris. Their settlement was thus left to the municipal law of the various states, and cases arising under them have destroyed commerce, annoyed and embarrassed foreign offices, and after years of negotiation have found their way to mixed commissions for arbitration and settlement.[24]

These are questions worthy of a conference to promote peace by removing grounds of controversy. The Russian program for the Second Hague Conference enumerated blockade among the subjects for consideration, and the Fourth Commission undertook the settlement of

[23] Moore's International Law Digest, Vol. VII, p. 797.

[24] For the practice of the United States, see Moore's International Law Digest, Vol. VII, pp. 780–858.

the question without reaching agreement. Indeed, its failure was more marked and pitiable than in contraband. The underlying reason was, however, the same: the conflict of neutral and belligerent interests. The blockade of southern ports during the Civil War, the seizure and confiscation of vessels and their cargo before the port was reached, the extension of the doctrine of continuous voyage to blockade, isolated the South and made its collapse on the field of battle a mere question of time. It is true that American theory and practice caused suffering to neutral nations, and either swept neutral commerce from the seas, or subjected it to visit and search, but the success of military operations involving, it may be, national existence, either required or justified it. Great Britain and the United States, for Anglo-American jurisprudence speaks the same language, were unwilling to accept the theory of the Continent, which permits a neutral to approach the blockaded port and requires the belligerent to note upon the papers of the blockade runner a warning not to attempt the offense, and adjourn capture until the vessel thus warned should attempt to enter the port. The Anglo-American practice is severe; but, supposing that the right of blockade is permitted and recognized, there seems no reason why a belligerent should permit, if the blockade is effective, neutral vessels to hover in the presence of a blockaded port, awaiting opportunity to steal into port during cover of fog and stress of weather, or during the temporary or accidental absence of a vessel or squadron.

After this statement of Anglo-American theory and practice of blockade, we are prepared to examine the provisions of the Declaration in order to see how far it codified admitted usage and solved the difficulties with which the subject has heretofore bristled. Its first article uses the term in the large and unrestricted sense of the word: "A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy, but within these limits the belligerent is free to exercise the right which war gives him." In the 18th Article the limitations upon blockade are briefly and adequately stated: "The blockading forces must not bar access to neutral ports or coasts." The second article is a restatement of the Declaration of Paris:

In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective, that is to say, it must be main-

tained by a force sufficient really to prevent access to the enemy coastline.

But this statement does not carry us any considerable distance, for it corrects the abuse of the paper blockade without in any way defining effectiveness. The Declaration of Paris has been universally accepted without producing uniformity, and the Anglo-American and Continental systems have opposed each other after as before the Declaration.

The next article marks a distinct advance, stating, as it does, that "the question whether a blockade is effective or not is a question of fact." Thus considered, it is a matter of no moment whether the blockading force is a squadron or a single vessel; whether it is stationed off the entrance to the harbor or is well out at sea. The ability to close the port to commerce is the test. This has always been Anglo-American doctrine, although it has been questioned, refined and disputed by nations which have never made a blockade and by writers familiar with theory but lacking in practice and experience.

Articles 4 and 5 are merely declaratory of existing usage, providing that temporary withdrawal of the blockading squadron due to stress of weather does not raise the blockade and that the blockade must be applied impartially. Thus, in the case of the *Frederick Molke*, Lord Stowell, then Sir William Scott, said:

> It is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind (if the suspension, and the reason of the suspension are known), that will be sufficient in law to remove a blockade.[25]

And in the case of the *Columbia*, decided the next year, the same great authority said:

> The blockade was to be considered as legally existing, although the winds did occasionally blow off the blockading squadron. It was an accidental chance which must take place in every blockade: but the blockade is not therefore suspended. The contrary is laid down in all books of authority; and the law considers an attempt to take advantage of such an accidental removal, as an attempt to break the blockade, and as a mere fraud.[26]

[25] 1 C. Robinson, 86–87.
[26] *Ibid.*, 154–156.

In the case of the *Franciska*, in the lower court, Dr. Lushington held impartiality of treatment to be an essential, saying:

> I apprehend the law to be, that when a blockade has been established by notification, or *de facto*, for so long a space of time that all neutral nations must be taken to be cognizant thereof, it is not legally competent to the blockading squadron to allow ingress or egress at their pleasure, and that if they do so, the blockade cannot be enforced against other neutral vessels.[27]

It is likewise to be inferred that Articles 6 and 7—allowing a warship to enter and to leave a blockaded port (Article 6), and the permission in distress accorded to a neutral vessel to enter and to leave a blockaded port, provided that it has neither discharged nor shipped cargo in such port (Article 7)—will be impartially applied to neutral warships and merchantmen in distress. The articles are permissive, not mandatory, and everything must depend upon the discretion of the commander. The slightest suspicion of bad faith will be fatal, and a neutral warship giving information or aid to the port, or a merchant vessel violating the terms of permission by discharging or shipping cargo, will find no favor at the hands of an energetic and competent commander.

The Declaration now passes from generalities admitted or acceptable as prerequisites of an effective blockade, and specifies that blockade, to be binding, must be declared in accordance with Article 9 and notified in accordance with Articles 11 and 12.

The declaration may be made by the blockading power or by naval authorities acting in its name and must specify: (1) Date when the blockade begins; (2) The geographical limits of the coastline under blockade; (3) The period within which neutral vessels may come out. These provisions are eminently reasonable, leaving to the belligerent liberty of action, but requiring a clear and detailed statement of intent. The failure to comply with them violates the Declaration and frees the neutral vessel leaving the port from seizure or capture (Articles 10 and 16).

It is not enough, however, to form an intent or even to declare it; it must be notified, in order to tax neutrals with knowledge of the blockade. Article 11 provides for a twofold notification: First, a notification to

[27] *The Franciska*, 2 Spinks, 113, pp. 126–127.

neutrals through diplomatic channels; Second, a notification to the local authorities who in turn notify as soon as possible the foreign consular officers at the port. Diplomatic notice taxes the subjects or citizens with constructive knowledge of the blockade, and the notification to the local authorities gives actual knowledge of the blockade. As in the case of the declaration and with its notification, a failure to comply with either of the provisions violates the blockade. The rule is simple, precise and reasonable.

If we examine the requirements of the declaration of blockade we see that it applies to a particular blockade within specified limits. Therefore, any extension is in reality a new blockade *pro tanto*, and must be declared and notified, to be binding. (Article 12.) In the same way any restriction of the blockade should be notified because a modification is, properly speaking, a new blockade, but notification in this instance can only be of interest to the neutral as increasing his rights. In the same way, the notification of the voluntary raising of a blockade operates to his advantage. If there is no notification in either case, neutral vessels are exempt from seizure, although they have a guilty intent; but it is little less than bad faith on the part of the belligerent not to notify the neutral at once of the raising of a blockade or of the renewal of restriction. It is therefore eminently proper that the convention requires notice. It will be observed that only voluntary withdrawal requires notification. It is to be presumed that the victor will cheerfully and promptly notify an involuntary withdrawal.

The Conference was particular to require a declaration and its notification, because capture and condemnation depend upon actual or presumed knowledge of the existence of the blockade (Article 14). Of actual knowledge, nothing need be said. A vessel not actually notified is presumed to know of the blockade, if it left a neutral port after notification to the neutral in whose country the port is situated, provided, however, that the notification was made in sufficient time to be published or otherwise made known by the neutral. This is a question of fact and the onus is upon the vessel to justify its ignorance (Article 15).

It may happen, however, that a vessel has neither actual nor presumptive notice and, as knowledge is a prerequisite to capture, notice must be given the vessel by the blockading squadron and entered upon

its books. Thereafter it is taxed with knowledge and an attempt to enter the blockaded port properly subjects the vessel to forfeiture. In the same way a failure to notify the local authorities and to limit a time within which the neutral may depart, frees the vessel leaving port from the penalty of seizure and condemnation; for, although it may know of the existence of the blockade, it has a conventional right, under Article 16, to depart without molestation. A failure to communicate the limit of time is in reality a failure to notify and is assimilated to it (Article 16).

In reference to Anglo-American practice, it may be said that a blockade *de facto* is good in law without notification (*The Franciska*, on appeal, 10 Moore, Privy Council, 46); but, as has been said by a very high authority, "in practice, notification of some sort is always given." [28] According to the Continental view, special notice was necessary in the case of every vessel attempting to enter a blockaded port. French practice also required general notification and a declaration addressed to the local authorities. On the other hand, the British rule accepted as sufficient notice what may be called general notoriety (*The Franciska*, Spinks, 113). It will be seen that both the Continental view and the British rule are replaced by these provisions of the Declaration of London, and the requirement of notification to the local authorities supersedes the American and British rule that the fact of blockade, so far as it exists, is in itself sufficient notice to vessels already in port. On this point an authority may be cited, though it seems hardly necessary. Thus, in the case of the *Vrouw Judith*, decided in 1799, Sir William Scott said:

> It is certainly necessary that a blockade should be intimated to neutral merchants in some way or other. It may be notified in a public and solemn manner, by declaration to foreign governments; and this mode would always be most desirable, although it is sometimes omitted in practice: but it may commence also *de facto*, by a blockading force giving notice on the spot to those who come from a distance, and who may therefore be ignorant of the *fact*. Vessels going in are, in that case, entitled to a notice before they can be justly liable to the consequences of breaking the blockade; but I take it to be quite otherwise with vessels coming out of the port which is the object of blockade; there no notice

[28] Hall's International Law, 4th edition, p. 722.

is necessary, after the blockade has existed *de facto* for any length of time; the continued fact is itself a sufficient notice: it is impossible for those within to be ignorant of the forcible suspension of their commerce: the notoriety of the thing supersedes the necessity of particular notice to each ship.[29]

So far the liability to capture has been mentioned for breach of blockade without specifying the locality of capture. Anglo-American practice permits capture between the port of departure, or rather three miles therefrom, and the blockaded port, while, on the other hand, Continental jurists, rather than practice, for England and the United States have supplied the precedents, insist that capture be limited to the actual physical breach of blockade. The acceptance of the Continental view would seriously impair the efficiency of the blockade, for the vessel destined to a blockaded port is violating blockade. And yet the offense does not lie wholly in the intent, for it is the intent coupled with the act that justifies capture. Logically, the vessel should be taken in the act; practically this would permit a vessel to lie in wait for an opportunity to run the blockade. A compromise was here possible, namely, to permit capture "within the area of the operations of the warships detailed to render the blockade effective" (Article 17).

But in this provision of Article 17 everything depends upon the definition of the area of operations. As this area is not defined by the convention and is practically left to the determination of the belligerent, it is evident that the compromise is based upon Anglo-American practice, as appears from the following official explanation:

When a government decides to undertake blockading operations against some part of the enemy coast it details a certain number of warships to take part in the blockade, and intrusts the command to an officer whose duty is to use them for the purpose of making the blockade effective. The commander of the naval force thus formed posts the ships at his disposal according to the line of the coast and the geographical position of the blockaded places, and instructs each ship as to the part which she has to play, and especially as to the zone which she is to watch. All the zones watched taken together, and so organized as to make the blockade effective, form the area of operations of the blockading naval force.

The area of operations so constituted is intimately connected with

[29] 1 C. Robinson, 152.

the effectiveness of the blockade, and also with the number of ships employed on it.

Cases may occur in which a single ship will be enough to keep a blockade effective,—for instance, at the entrance of a port, or at the mouth of a river with a small estuary, so long as circumstances allow the blockading ship to stay near enough to the entrance. In that case the area of operations is itself near the coast. But, on the other hand, if circumstances force her to remain far off, one ship may not be enough to secure effectiveness, and to maintain this she will then have to be supported by others. From this cause the area of operations becomes wider, and extends further from the coast. It may therefore vary with circumstances, and with the number of blockading ships, but it will always be limited by the condition that effectiveness must be assured.

It does not seem possible to fix the limits of the area of operations in definite figures, any more than to fix beforehand and definitely the number of ships necessary to assure the effectiveness of any blockade. These points must be settled according to circumstances in each particular case of a blockade. This might perhaps be done at the time of making the declaration.

It is clear that a blockade will not be established in the same way on a defenceless coast as on one possessing all modern means of defence. In the latter case there could be no question of enforcing a rule such as that which formerly required that ships should be stationary and sufficiently close to the blockaded places; the position would be too dangerous for the ships of the blockading force which, besides, now possess more powerful means of watching effectively a much wider zone than formerly.

The area of operations of a blockading naval force may be rather wide, but as it depends on the number of ships contributing to the effectiveness of the blockade, and is always limited by the condition that it should be effective, it will never reach distant seas where merchant vessels sail which are, perhaps, making for the blockaded ports, but whose destination is contingent on the changes which circumstances may produce in the blockade during their voyage. To sum up, the idea of the area of operations joined with that of effectiveness, as we have tried to define it, that is to say, including the zone of operations of the blockading forces, allows the belligerent effectively to exercise the right of blockade which he admittedly possesses and, on the other hand, saves neutrals from exposure to the drawbacks of blockade at a great distance, while it leaves them free to run the risk which they knowingly incur by approaching points to which access is forbidden by the belligerent.[30]

So far it is presumed that the actual is also the ultimate destination of ship and cargo; but it is familiar practice to disguise ultimate destina-

[30] Correspondence and Documents respecting the International Naval Conference, held in London, Dec. 1908–Feb. 1909. Miscellaneous No. 4 (1909), pp. 41–42; Treaties, Conventions, etc., Vol. 3 (Charles), p. 293.

tion by the interposition of a neutral port. The ostensible venture is thus between two neutral ports and is as such permissible. But if the intent be to transship the cargo at the neutral port and force the blockade at a later period under favorable circumstances, it would appear that a fraud has been committed upon the belligerent such as to justify capture and confiscation. Though broken in fact, the voyage is continuous, and freedom from capture in such a case is to sacrifice substance to form. During the Civil War, Nassau, a struggling village of the Bahama Islands within easy distance of the blockaded ports of the Confederate States, became, through the activity of merchants and traders interested in blockade running, a large and flourishing city. Its prosperity, based upon fraud and bad faith, passed with the war and it is today what it would have been in the sixties but for the war.[31] The United States, however, in a spirit of compromise and for the sake of unanimity, yielded, in Article 19, the doctrine of continuous voyage, in so far as it applied to blockade. The adoption of the Anglo-American theory of blockade and the permissibility of capture within "the area of operations" will, however, probably render the concession more specious than real. Even if this should be the case, the concession deserves special mention, as it is the renunciation of an historic and national doctrine, and nations are even less inclined than individuals to renounce a cherished doctrine under pressure, even although the general good suggests or requires it. The desire to save one's face is an international as well as an individual doctrine.

Article 20 is another surrender, this time, however, of a time-honored Anglo-American practice, for the extension of the doctrine of continuous voyage to blockade may be considered American rather than British practice. In the present instance the English-speaking countries agreed, contrary to previous practice, that the vessel which has broken the blockade is only liable to capture as long as it is pursued by a ship of the block-

[31] In the leading case on the subject, *The Springbok*, 5 Wallace (1866), 1, it was evident from the ship's papers and other documentary evidence that the cargo, ostensibly for Nassau in the Bahama Islands, was to be transshipped from this point to a blockaded port of the Confederate States. The cargo was condemned. A claim for its value came before the British and American Claims Commission, under the Treaty of 1871, but was unanimously rejected (4 Moore's International Arbitrations, pp. 3928–3935).

ading force. As, however, the area of operations is large, the area of capture is wide and it is to be presumed that the lighter craft of the belligerent will lack neither zeal nor efficiency.

In the case of the *Frederick Molke* (1798), Sir William Scott, speaking of contraband and blockade, stated the reasons which led to a different treatment. Thus:

> It is said, that this was a new transaction, and that we have no right to look back to the delinquency of the former voyage; and a reference is made on this point to the law of contraband, where the penalty does not attach on the returned voyage. But is there that analogy between the two cases, which should make the law of one necessarily or in reason applicable to the other also? I cannot think that there is such an affinity between them. There is this essential difference, that in contraband, the offence is deposited with the cargo; whilst in such a case as this, it is continued and renewed in the subsequent conduct of the ship.[32]

In the case of the *Welvaart Van Pillaw*, decided a year later, the same eminent judge said:

> Another circumstance on which exemption is prayed, is, that she had escaped the interior circumvallation, if I may so call it, that she had advanced some way on her voyage, and therefore that she had in some degree made her escape from the penalties. I cannot accede to that argument; if the principle is found, that a neutral vessel is not at liberty to come out of a blockaded port with a cargo, I know no other natural termination of the offence but the end of that voyage. It would be ridiculous to say, if you can but get past the blockading force, you are free: this would be a most absurd application of the principle. If that is found, it must be carried to the extent that I have mentioned; for I see no other point at which it can be terminated. Being of opinion that the principle is found, I shall hold, that if a ship, that has broken a blockade, is taken in any part of that voyage, she is taken *in delicto*, and subject to confiscation.[33]

And in the case of the *General Hamilton*, decided in 1805, Sir William Scott stated the rule and applied it under exceptional circumstances:

> Another distinction is, that the vessel had terminated her voyage, and therefore that the penalty would no longer attach. It is true, that she had been driven into a port of this country by stress of weather; but that is not described by the master as forming any part of the original destination, which is represented to have been New Orleans. It is im-

[32] 1 C. Robinson, 86, p. 87.
[33] 2 C. Robinson, 128, p. 130.

possible to consider this accident as any discontinuance of the voyage, or as a defeazance of the penalty which has been incurred.[34]

In the instructions to the British delegates it is stated that "according to the British theory the vessel would remain liable to pursuit and capture until she reached the terminal point of her homeward voyage. The opposing school holds that the right to pursue and capture ceases when the pursuit has been abandoned." [35]

The final article of the chapter is declaratory:

Article 21. A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.

According to British law, to quote a leading case, "the owners of the cargo are concluded by the illegal act of the master, though it may have been done without their privity and even contrary to their wishes." [36] In the much earlier case of the Mercurius (1 C. Robinson, 80), decided in 1798, Lord Stowell appeared to hold that a violation of blockade by the master affected the ship, but not the cargo, unless it was the property of the same owner, or unless the owner was cognizant of the intended violation; "but the subsequent cases, to quote again from the *Panaghia Rhomba*, decided in 1858," appear to have carried the rule much further, and to have established, that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, and they might, therefore, by possibility be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence; that in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent, the master shall be treated as the agent for the cargo as well as for the ship." [37] Article 21 changes the

[34] 6 C. Robinson, 61, p. 62.

[35] Parliamentary Papers, Miscellaneous No. 4 (1909), pp. 25–27.

[36] 12 Moore P. C. 168 (1858), at page 184.

[37] 12 Moore P. C., 168, p. 186. The cases referred to as establishing the rule are the following decisions by Lord Stowell: *The Alexander*, 4 C. Robinson, 93 (1801); *The Adonis*, 5 C. Robinson, 256 (1804); *The Exchange*, Edwards, 39 (1808); *The James Cook*, Edwards, 261 (1810).

presumption and the practice based upon it. The cargo is still liable to condemnation, but the shipper is allowed to show as a fact that he "neither knew nor could have known of the intention to break the blockade at the time of the shipment."

Such, in brief, are the provisions of the Declaration of London dealing with blockade, its declaration, extent, and effectiveness, and the penalties imposed for their violation. An objection made to the ratification of the Prize Court Convention was, as stated by Mr. Westlake, the difference between English and Continental practice in the matter of blockade. It is believed that no serious criticism can be made of these articles. The requirements imposed by Continental theory and practice were modified to enable the Governments of Great Britain and the United States to accept them and, in turn, both Great Britain and the United States yielded practices and prepossessions which had perhaps an historical value rather than a present importance. The provisions of the chapter dealing with blockade seem to be reasonable in their terms and effects, fair to belligerents and neutrals, supposing that enemy ports are to be blockaded and neutrals prevented from trading with them as in times of peace, and so clear and precise, except perhaps in the matter of the area of pursuit and capture of blockade runners, as to make the rights and duties alike of belligerents and neutrals certain and known in advance of hostilities. No serious or insurmountable objection to their acceptance has been stated.

CONTRABAND

Such does not seem, however, to be the case with the chapter dealing with contraband, although it is believed that criticism is either unfounded or that the objections are more specious than real. The general treatment of contraband and its threefold division by Grotius still remain, says Hall, the natural framework of the subject. For this reason the text of Grotius, and an approval of it from an authoritative judgment of the Supreme Court of the United States, are quoted before taking up the articles of the Declaration of London dealing with the matter of contraband.

First, of Grotius, who says in the fifth chapter of the third book of his immortal work on international law:

But the question often arises, what is lawful against those who are not enemies, or will not allow themselves to be so called, but who provide our enemies with supplies of various kinds? This has been a point sharply contested, both anciently and recently; one party defending the rigorous rights of war, the other, the freedom of commerce.

In the first place, we must make a distinction as to the things supplied. For there are some articles of supply which are useful in war only, as arms; others which are of no use in war, but are only luxuries; others which are useful both in war and out of war, as money, provisions, ships and their furniture. In matters of the first kind, that is true which Amalasuintha said to Justinian, that they are of the party of the enemy who supply him with what is necessary in war. The second class of objects is not a matter of complaint. * * *

In the third class, objects of ambiguous use, the state of the war is to be considered. For if I cannot defend myself except by intercepting what is sent, necessity as elsewhere explained, gives us a right to intercept it, but under the obligation of restitution, except there be cause to the contrary. If the supplies sent impede the exaction of my rights, and if he who sends them may know this; as if I were besieging a town, or blockading a port, and if surrender or peace were expected; he will be bound to me for damages.[38]

How thoroughly the passages quoted from Grotius express the theory and practice of the United States will appear from the following excerpt from the judgment of Chief Justice Chase in the case of the *Peterhoff* (1866, 5 Wallace, 28, 58) arising out of the war between the States.

The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these three classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

It is to be noted that contraband is neutral property, and, as distinguished from enemy property, is not liable to seizure and confiscation

[38] De Jure Belli ac Pacis, lib. iii, c. i., § 5.

unless exclusively or properly susceptible of warlike use, and its shipment to the enemy enables him to prosecute and continue the war. Trade in contraband is not forbidden by international law to the neutral subject or citizen, but its unneutral character is so far recognized that the belligerent may intercept and confiscate it. The trade is thus permitted, but subject to the risk of the shipper. The gist of the offense is the injury to the belligerent from the nature of the goods conveyed. Therefore, the vessel is conducted to a port of the captor where the articles of contraband are duly condemned, that is confiscated, but the vessel is liberated with loss of time, freight and expenses. If, however, the vessel is privy to the transaction, or if vessel and cargo belong to the same owners, vessel and cargo share the same fate. Innocent articles on board are known by the company they keep, but "escape from the contagion of contraband" to quote Lord Stowell, "if the property of a different owner." [39]

With the deposit of the articles at the port of destination, the transaction is completed, and the vessel has been purged, as it were, of the offense. There is nothing to intercept and neither the proceeds of sale can be touched nor the vessel seized.[40]

It is thus seen that the injury to the belligerent consists in delivering the goods to the enemy port and this he is permitted to prevent. The question naturally arises as to when the attempt begins so that the belligerent may intervene. Anglo-American practice answers, the moment the vessel leaves territorial waters and reaches the high seas bent upon its hostile destination. The intent to transport the contraband, coupled with the actual transportation, are sufficient. It follows, therefore, that the original intent is not changed by touching at a neutral port, or even by transshipping the cargo in furtherance of the intent. The voyage is a unit, it is continuous in law though broken in fact. And the penalty is imposed irrespective of accidental circumstances, or attempt by transshipment to disguise the transaction.

From this brief outline it is apparent that the interests of neutrals and belligerent clash. It is at once obvious, as Grotius pointed out wellnigh three centuries ago, that the world is divided in opinion, "one party

[39] *The Staat Embden*, 1 C. Rob. 31 (1798).
[40] *The Imina*, 3 C. Rob. 167 (1800).

defending the rigorous rights of war, the other, the freedom of commerce." Neutrals naturally resent the delay and inconvenience to which the commerce of their citizens or subjects is subjected by the visit and search, capture and confiscation by the forces of either belligerent, simply because two or more nations are minded to break the peace with or without reason. The uncertainty of the subject—for articles are added to the lists of absolute and relative contraband, not as the result of general agreement, but to suit the selfish interest or supposed conveniences of the belligerent—works a hardship on innocent shipments. It should not be forgotten that war creates a market not only for absolute contraband but for articles susceptible of an innocent as well as questionable use, and it seems as illogical as unreasonable that belligerents should destroy a market which their resort to arms has created. On the other hand, a free and untrammeled commerce in war materials and in articles capable of warlike use does supply belligerents with the sinews of war and thus tends to influence it; in rare and isolated cases, to prolong it. But men of affairs are impartial: they will supply either belligerent or both for profit. National sentiment may prefer one belligerent to the other, but there is proverbially no friendship in business. Trade seeks its market. It may be that one belligerent offers a better opportunity; that geography and local situations play an unequal part, but that is the affair of the belligerent not of the neutral.

As the interdependence of nations is as marked, though not so pronounced, as their independence, and as the conflict between two involves directly or indirectly all members of the family of nations, it seems only just and reasonable that what concerns all should be settled by all, and that neither belligerent nor neutral should determine the matter for the other. The nations in conference should take measures in behalf of all, without overlooking, yet without giving undue weight, to special interests.

The question of contraband was discussed at great length at the Second Hague Peace Conference, which, however, was unable to agree upon this very important subject affecting neutral trade as well as belligerent activity, although a list of commodities of the class known as absolute contraband was framed, acceptable to the committee of examination which had the matter in charge. As was the case with

blockade, which was also considered by the Hague Conference without reaching an agreement, matters of contraband were left unsettled, and under Article 7 of the Prize Court Convention were remitted for definition to the proposed court, thus investing it with the power to decide authoritatively and without appeal questions of a very delicate and far-reaching importance, which the Hague Conference itself, composed of representatives of the Powers recognizing and applying international law in their foreign relations, could neither define nor compromise in a manner to meet with general approval. It should be said, before entering into details, that Great Britain, which had hitherto stood for very extensive rights in the matter of contraband, astonished the Second Hague Conference by proposing to abolish contraband "in case of war between the Powers signing a convention to this end," so as "to lessen the difficulties suffered by neutrals in case of war," and to limit the right of visit and search to the establishment of the neutral character of the merchant vessel.[41]

Although this proposition met with very general favor, and an absolute majority of the Conference voted for it,[42] nevertheless the opposition of the larger Powers prevented its acceptance by the Conference, and it is a matter of interest to note in this connection that Great Britain did not renew its proposal at the London Conference.

If it be asked why a project which secured an absolute majority of the states represented at the Second Hague Conference did not form the basis of a convention to be signed by the Powers in its favor, the answer is that an international conference adopts the principle of unanimity, instead of the principle of majorities which obtains in parliaments, for the reason that the states forming the society of nations are regarded as

[41] Deuxième Conférence de la Paix, Actes et Documents, Vol. 3, 4th Commission, first session, p. 742.

[42] The following 26 states voted for the British proposition: Argentine, Austria-Hungary, Belgium, Brazil, Bulgaria, Chile, China, Cuba, Denmark, Santo Domingo, Spain, Great Britain, Greece, Italy, Mexico, Norway, Paraguay, Holland, Peru, Persia, Portugal, Salvador, Servia, Siam, Sweden, Switzerland.

The following 5 states voted against it: Germany, United States, France, Montenegro, Russia.

The following 4 states abstained from voting: Japan, Panama, Roumania, Turkey. (Deuxième Conf. de la Paix, Actes et Documents, Vol. 1, p. 259, note 5.)

equals [43] and are neither controlled nor coerced by majorities, although they are no doubt influenced by them, and it should be said in this connection that, although as a matter of law states are regarded as legally equal, the influence of states depending on other elements than those of law is not and cannot be equal. The opposition, therefore, of one or more of the great Powers is fatal to a proposition, and the formal rejection of the British proposition by such states as Germany, France, Russia and the United States rendered further discussion of it at the Conference futile. The law of contraband was therefore considered as one to be retained in the practice of nations and, as previously stated, the committee of examination agreed upon a proposition which, introduced at the London Conference, became Article 22. This article deals with absolute contraband; Article 24 of the Declaration deals with conditional contraband. As these two articles are very important and have been the subject of much discussion—especially the latter of the two,—it is necessary to quote their exact text:

ARTICLE 22

The following articles may, without notice, be treated as contraband of war, under the name of absolute contraband:

(1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

(2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.

(3) Powder and explosives specially prepared for use in war.

[43] Equality as a legal consideration of the law of nations has perhaps never been more clearly stated than in the following passage from the judgment of Chief Justice Marshall, speaking for the Supreme Court of the United States in the case of the *Antelope*, decided in 1825:

"In this commerce slave trade thus sanctioned by universal assent, every nation had an equal right to engage. How is his right to be lost? Each may renounce it for its own people; but can this renunciation affect others?

"No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be divested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it" (*The Antelope*, 1825, 10 Wheaton, 66, 122).

(4) Gun mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.
(5) Clothing and equipment of a distinctively military character.
(6) All kinds of harness of a distinctively military character.
(7) Saddle, draught, and pack animals suitable for use in war.
(8) Articles of camp equipment, and their distinctive component parts.
(9) Armor plates.
(10) Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.
(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

ARTICLE 24

The following articles, susceptible of use in war as well as for purposes of peace, may, without notice, be treated as contraband of war, under the name of conditional contraband:
(1) Foodstuffs.
(2) Forage and grain, suitable for feeding animals.
(3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.
(4) Gold and silver in coin or bullion; paper money.
(5) Vehicles of all kinds available for use in war, and their component parts.
(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks, and their component parts.
(7) Railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs, and telephones.
(8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines.
(9) Fuel; lubricants.
(10) Powder and explosives not specially prepared for use in war.
(11) Barbed wire and implements for fixing and cutting the same.
(12) Horseshoes and shoeing materials.
(13) Harness and saddlery.
(14) Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

It will thus be seen that the traditional division of contraband into absolute and conditional is retained and that the objects enumerated in the two articles are considered as contraband *de plein droit*, to use the French term, rendered into English "without notice," and which are stated in the official report to "imply that the provision becomes opera-

tive by the mere fact of the war." This distinction is important because Article 23 provides that other objects "exclusively used for war" may be added, upon notice, to the list of absolute contraband, and that other articles "susceptible of use in war" may likewise be added, upon notice, to the list of conditional contraband (Article 25). It is therefore necessary to consider in connection with Articles 22 and 24, Articles 23 and 25, because the lists of contraband *de plein droit* are provisional and are not to be regarded as a complete enumeration of the articles that may be considered, at the discretion of the belligerents, and in compliance with the terms of the Declaration, as forming respectively absolute and conditional contraband. The element of certainty so necessary to neutrals does not obtain and, while the objects enumerated in the two lists are, as of right, absolute or conditional contraband, binding belligerent and neutral alike and thus beyond the scope of controversy, the permission contained in Articles 23 and 25 introduces the element of uncertainty so annoying and burdensome in times past to neutrals, even although the permission is conditioned upon notice, which may, however, be made either before or after the outbreak of hostilities. Given the discoveries of science and the changing conditions of warfare, it is impossible to adopt a hard and fast line; for nations are unwilling to deprive themselves, by any agreement or declaration, however positive its terms may be, of the use, indeed one might say the abuse, of scientific discoveries; but it is believed that the advantages to belligerents and the benefits to neutrals might have been preserved by a rigid enumeration of the articles of absolute and conditional contraband and by a provision of a periodic revision of the text, which would not have prevented belligerents from enlarging the categories, as experience might suggest, but would have secured to neutrals and to neutral trade the inestimable benefits of certainty within defined periods.[44]

[44] It was proposed by Spain at the Conference that additions to the categories of contraband should be made by common agreement. The amendment proposed to Article 2 respecting contraband was: "Articles and materials that are exclusively used for war may be added to the list of absolute contraband by a common agreement among the Powers" (Annex No. 60, Parliamentary Papers, Miscellaneous, No. 5, 1909, p. 248). This amendment was filed January 27, 1909, by the Spanish delegation in the seventh meeting of the commission and was intended to apply not only to Article 2, then under discussion, but also to Article 4. In view of the great im-

Such a clause would, it would seem, be in the interest of the Declaration, because it neither is nor can be in the nature of things regarded as permanently binding, a fact recognized by Article 69 of the Declaration, which recognizes the right of a belligerent to withdraw from the Declaration, as far as it is concerned, at the expiration of twelve years, upon notice given a year in advance of this period, and it can not be doubted that a nation dissatisfied with the Declaration will take such action, supposing that it is ratified. Indeed, the Prize Court Convention, to secure whose ratification the Declaration was negotiated, contemplates the modification of the article concerning the composition of the court by providing that "two years before the expiration of each period referred to in paragraphs 1 and 2 of Article 55, any contracting Power can demand a modification of the provisions of Article 15 and of the annexed table, relative to its participation in the composition of the court" (Art. 57).

In another convention of the Second Hague Conference a precedent is found for such action. Thus, the Convention on Contact Mines recognizes the impossibility of formulating rules which shall adequately guarantee the rights and duties of the Powers in the matter of mines and provides that the convention, concluded for a period of seven years, shall be reopened six months before the expiration of this period "in the event of the question not having been already reopened and settled by the Third Peace Conference" (Art. 12).

portance of the question thus raised, it was decided to have the documents printed and distributed before discussing it. In the report to the commission, Annex No. 111, at page 303, the reporter said:

"Some have considered excessive the right given to a Power to make an addition to the list by a mere declaration and it has been proposed to require the consent of the other Powers. But it was objected that the consent of all the Powers would not be easy to obtain in time of peace and that in time of war it would be singular to require the consent of the hostile Power. In reply to the objection, it was proposed to make a distinction between time of peace and time of war by requiring the consent of the other Powers only in time of peace. This amounted practically to doing away with the right in time of peace, and the proposal was finally withdrawn. It should be noticed that this right does not present the dangers attributed to it. In the first place, of course the declaration is operative only for him who makes it, in the sense that the added article will be contraband only for him as a belligerent; other states may likewise make a similar declaration. The addition can only concern articles *exclusively used for war;* at the present time it would be difficult to indicate such objects not appearing in the list. The future is left free."

But to return to the Declaration of London. Articles 22 and 24 must, in view of the right to vary them expressly stated in Articles 23 and 25, be considered as provisional and, to use a phrase dear to diplomacy, elastic. It is no answer to the objection made to them that notice of articles to be added "must be addressed to the governments of other Powers or to their representatives accredited to the Power making the declaration," and that the notification after the outbreak of hostilities need be addressed only to neutral Powers, for the criticism goes to the right to modify the lists, not to the method of notification of such modification. But however flexible and unsatisfactory the lists may be considered and however much they might be extended upon notice, the Conference sought to place a limit upon the action of the belligerents in Articles 27, 28, and 29, by providing, in Article 27, that articles which are not susceptible of use in war may not be declared contraband of war, and by providing in Articles 28 and 29 the following free lists:

ARTICLE 28

The following may not be declared contraband of war:

(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.

(2) Oil seeds and nuts; copra.

(3) Rubber, resins, gums, and lacs; hops.

(4) Raw hides and horns, bones and ivory.

(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

(6) Metallic ores.

(7) Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.

(8) Chinaware and glass.

(9) Paper and paper-making materials.

(10) Soap, paint and colors, including articles exclusively used in their manufacture, and varnish.

(11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.

(12) Agricultural, mining, textile, and printing machinery.

(13) Precious and semi-precious stones, pearls, mother-of-pearl, and coral.

(14) Clocks and watches, other than chronometers.

(15) Fashion and fancy goods.

(16) Feathers of all kinds, hairs, and bristles.

(17) Articles of household furniture and decoration; office furniture and requisites.

ARTICLE 29

Likewise the following may not be treated as contraband of war:

(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30.

(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.

It is believed that these articles, although devised in the interest of neutrals and of humanity, are also of advantage to belligerents by withdrawing in clear and express terms certain objects from the domain of contraband and thus limiting the field of controversy. But Article 27 is not, as are the two preceding articles, self-operative. It is one thing to say that objects not susceptible of a warlike use cannot be considered contraband of war and quite another thing to determine what articles are or are not susceptible of such use, and, as no method is prescribed for determining the nature of contraband other than its supposed usefulness in war, it is to be presumed that the views of belligerents and neutrals will differ as to what is and what is not susceptible of warlike use, and that the Declaration will thus open instead of closing the doors to controversy. The proposed court will doubtless pass upon the question, a solution eminently satisfactory to the partisans of judicial settlement, but likely to be objectionable to those who hesitate to confer upon it legislative functions within narrow limits, so as to leave their respective countries the greatest possible freedom of action.

So much for what may be considered the content of contraband. The next question taken up is, what may be considered the destination as determining its nature and the penalties to which the carriage of contraband is subjected? For it may be admitted that an article is of a warlike nature or that it may be used in warfare, but that it is neither directly nor indirectly destined to the enemy, in which case it should not be, and in fact is not considered to be, subject to the pains and penalties permitted by international law. The question of destination is said by the learned reporter to be "the second element in the notion of contraband," and the matter of destination is as perplexing as it is important. The aim of the belligerent is to prevent his enemy from ob-

taining from neutral sources objects which may enable him to carry on, and thus to prolong, the war, and, so far as belligerents are concerned, they not unnaturally desire to take it wherever found, and in Anglo-American practice—especially American practice—very great latitude is left to the captor, with a corresponding hardship upon the neutral, supposing that his trade is not to be disturbed or interfered with, as is his desire. Supposing that articles of contraband shipped by the neutral are subject to capture and confiscation, it is clearly in the interest of the belligerent to seize the property wherever found, if the vessel carrying it is destined to an enemy port. If the ship's papers show that the vessel is destined to an enemy port, the matter is clear and simple. If, however, the vessel staggering under its load of contraband is destined to a neutral port, it might seem at first sight that the matter is free from doubt, because trade between neutral ports is not forbidden. But it does not follow that the ostensible is in reality the ultimate destination, for a neutral port may be and often is thrust in between the point of departure and the final destination of the cargo. If the neutral port is in close proximity to the enemy port and if a neutral destination, as shown by the ship's papers, protects the vessel from capture during its voyage to the neutral port, it is evident that the shipper has gone a long way to supply the enemy with contraband, and that by the simple device of transshipment of cargo from the neutral port, the enemy, as well as the shipper, is likely to gain by the transaction, unless the enemy port in question be blockaded.

The question, therefore, presents itself, whether a voyage to a neutral port, from which a transshipment is comparatively easy and from which transshipment actually does occur, is not to be considered, although broken in fact, as continuous in law, and whether a belligerent would be regarded as justified in considering the voyage as continuous and intercepting the vessel and its cargo, whenever it appeared, from the attendant circumstances and as the result of experience, that the ultimate, as distinguished from the ostensible, destination of the vessel is in reality a port of the enemy? Such has been and is the practice of Great Britain and of the United States, as evidenced by a long line of carefully considered and well reasoned decisions of their prize courts. The doctrine originated in the capture by Great Britian of neutral vessels carrying

on in time of war the coasting or colonial trade to which they were not admitted in time of peace, and was extended to apply to a shipment of contraband from one neutral port to another, provided it appeared that the neutral port was interposed in order to break the continuity of the voyage whether by merely touching at the port, or by unloading the cargo and reshipping it either on the original or on a substituted vessel.

In lieu of many cases which might be cited on this point, for the British and American reports are full of them, a portion of the judgment of Sir William Grant is quoted from the case of the *William*, decided in 1806,[45] not merely because it is a leading authority, but because of the weight which attached to the opinions of that great and learned judge, whether they be in the domain of equity or of international law. In this case the *William* proceeded from La Guayra in Venezuela, then a Spanish colony, to the United States, where the cargo was landed, entered at the custom house, reshipped to the port of Bilboa in Spain, and the vessel was captured on the voyage to this latter port. In considering whether the voyage was continuous or was broken by the interposition of a neutral port, Sir William Grant said:

> The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done: Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm, that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible, but when it is discovered, it is according to the truth and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those acts have been

[45] Reported in 5 C. Robinson, 385.

attended with trouble and expense cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence, to show the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be found to accept as a substitute for the observance of the law, the means however operose, which have been employed to cover the breach of it. Between the actual importation by which a voyage is really ended, and the colorable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them.—The landing of the cargo, the entry at the custom house, and the payment of such duties as the law of the place requires, *are necessary ingredients* in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they are *mere voluntary ceremonies*, which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage which he has resolved to continue, the appearance of being broken by an importation, which he has resolved not really to make.[46]

If Sir William Grant's reasoning be sound, and it is believed in law that it is unanswerable, it would necessarily follow that goods other than contraband, shipped from a neutral port to another neutral port with the intention of being transported from the latter to an enemy port under blockade, would be in law a shipment from the original port to the port of blockade, and that the extension by the United States of the doctrine of continuous voyage to cover voyages to blockaded ports was as sound in theory as it was effective in practice. It has been stated, however, that the United States renounced the doctrine of continuous voyage as applied to blockade, in order to insure the success of the Conference. If the doctrine of continuous voyage be admitted, there seems to be no reason why it should not be applied to conditional as well as to absolute contraband, because contraband, whether it be absolute or conditional, is liable to capture and confiscation, if directed to an enemy port. The intent in each case is the same; namely, to supply the enemy with objects useful in war, and the fact that some commodities are perhaps not so useful to the enemy as others is no reason why they should not be captured, provided they are actually of use to the enemy, if the ultimate

[46] 5 C. Robinson, 395, pp. 395–397. See also the leading American case of the *Stephen Hart*, Blatchford's Prize Cases, 387 (1863).

destination is an enemy port. The nations have hitherto been divided into two groups: the one applying and the other rejecting the doctrine of continuous voyage, and as a compromise rather of fact than of law, Great Britain and the United States consented to renounce the doctrine of continuous voyage in cases of conditional contraband, and the nations opposing the doctrine consented to recognize it in the case of absolute contraband.

But the value of the doctrine and the services it may render to the belligerent even in cases of conditional contraband are recognized by Article 36, which permits capture "in cases where the enemy country has no seaboard." This would seem to the uninitiated as giving back with one hand what is taken away with the other, for the neutrality of a port is not affected by the fact that the place of ultimate destination is reached by land instead of by sea. Shipment to Lorenzo Marquez and then transshipment on land to the Boers without a seaport apparently differs from shipment to Nassau and transshipment by water to a port of the Confederate States of America. It depends in this case, as in many others, whose ox is gored. However, the neutral knows his rights and the risks which he assumes.

With this explanation of the doctrine and its partial rejection, it is believed that the following provisions of the Declaration dealing with contraband as affected by destination are clear without further comment, except in the case of Article 34, although the question of proof might well be examined if considerations of space permitted:

Article 30

Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land.

Article 31

Proof of the destination specified in Article 30 is complete in the following cases:

(1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.

(2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before

reaching the neutral port for which the goods in question are documented.

ARTICLE 32

Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.

ARTICLE 33

Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy state, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4).

ARTICLE 34

The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband.

In cases where the above presumptions do not arise, the destination is presumed to be innocent.

The presumptions set up by this article may be rebutted.

ARTICLE 35

Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.

ARTICLE 36

Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture in cases where the enemy country has no seaboard.

In view of the discussion and criticism to which Article 34 has been subjected, in so far as conditional contraband is concerned, and more

especially as food stuffs, made conditional contraband by Article 24, section 1, are concerned, it may be well to attempt to ascertain the exact meaning of Article 34 by an examination of the text as explained by the official report of Professor Renault, which interpreted and accompanies the Declaration. It may well happen that the meaning of an article is open to doubt, because of the brevity required or usually found in texts of this kind. The question then arises whether the article is to be interpreted solely by reference to its terms, as is the British and in a lesser degree the American practice in the case of an act of a legislature, or whether reference may be had to the explanation, technically called the report, which, as heretofore stated, usually accompanies a convention or declaration of an international conference. The question is not one of form but of substance and, as a competent person is appointed by the conference to draft the report, which is examined by the members of the conference, corrected in accordance with their suggestions, and adopted by it, it would appear that, while only the text of the convention or declaration is ratified by the governments participating in the conference or adhering subsequently to it, the convention or declaration is nevertheless to be understood in the sense in which it was explained and interpreted in the report accompanying it.

It appears from an examination of the minutes of the London Conference that Professor Louis Renault was appointed to prepare the report on the Declaration of London; that it was presented, considered and amended in some respects at the session of February 25, 1909, after which the president declared the report to be accepted by the Conference. In an interesting letter to the *Times*, dated January 31, 1911, the late Professor Westlake insisted that "both the report and the articles were adopted" by the Conference, whereas Professor Holland maintains that only the text of the articles was adopted, not the report, and that the Declaration as such should be construed without reference to the report. But without attempting to arbitrate the dispute between these two learned and equally competent authorities, it may be said that neither was a member of the Conference, and that their views, however interesting, are but secondary evidence of the importance which the delegates themselves attached to the report. The president of the Conference, Earl Desart, declared the report to be accepted by the Conference, and

this same Earl Desart, as chairman of the British delegation, stated to his government the relation existing between the Declaration, on the one hand, and the report, on the other. In transmitting the proceedings of the Conference to Sir Edward Grey, His Majesty's Principal Secretary of State for Foreign Affairs, under date of March 1, 1909, Earl Desart and the British delegates used the following language:

> Attached to these minutes is, among other papers, the General Report to the Conference prepared by M. Renault. We desire to call your particular attention to this document, which contains a most lucid explanatory and critical commentary on the provisions of the Declaration. It should be borne in mind that, in accordance with the principles and practice of continental jurisprudence, such a report is considered an authoritative statement of the meaning and intention of the instrument which it explains, and that consequently foreign governments and courts, and, no doubt also, the International Prize Court, will construe and interpret the provisions of the Declaration by the light of the commentary given in the report.[47]

It might be objected, however, that the British Government attached no particular importance to the views of Earl Desart and his colleagues and considered, as would be the case with a municipal statute, the text alone as binding. This is, however, not the case, as the views of the delegates were formally adopted by the British Foreign Office in a communication addressed to the Edinburgh Chamber of Commerce, the material portion of which is as follows:

> In view of the reference, under the first head of the conclusions summarized at the end of your letter, to the desirability of eliminating any elements of ambiguity from the rules laid down, Sir E. Grey desires me to point out that this object is largely attained by the Report of the Drafting Committee of the London Naval Conference, 1908–9. Your directors are no doubt aware that it is the well recognized practice of international conferences to entrust to a special committee the drafting of a General Act of any Conventions to be adopted and signed by the plenipotentiaries. Where the report in which the Drafting Committee submits to the Conference the result of its labors contains a reasoned commentary elucidating the provisions of such Conventions, it becomes, if formally accepted by the Conference, an authoritative interpretation of the instruments, and the conventions must thereafter be construed by the signatory Powers with reference to the commentary where nec-

[47] Correspondence and Documents respecting the International Naval Conference held in London, December 1908–February 1909; Miscellaneous No. 4 (1909), p. 94.

essary. The General Report of the drafting committee of the Naval Conference was adopted by the Conference at its eleventh plenary meeting on the 25th of February, 1909, and, accordingly, if the proposed International Prize Court is set up at The Hague, it will be found, when applying the provisions of the Declaration of London as between the signatories, to construe the text in conformity with the terms of the Report.[45]

We are therefore justified in considering, so far as the British Government is concerned, Professor Renault's report as the official interpretation of the Conference, and to refer to it in order to clear up any doubt and ambiguity of the Declaration, in so far as the question is dealt with in the report. Viewed in the light of the report, Article 34 is, it is believed, acceptable and is not open to the objections which might be made to it, if its text alone were considered; for by a combination of Articles 33 and 35 with Article 34 it is apparent that conditional contraband is not subject to capture unless it be destined to the use of the enemy and addressed either to the enemy authorities or "to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy." The English version translates *commerçant* of the French text by *merchant;* but the character of the contractor, as stated in the text, is defined in Professor Renault's report and was, it is believed, accepted by the Conference in the sense there attached to it. That the reader may have before his eyes the official explanation of the nature and scope of these articles in the sense in which they were understood and adopted by the Conference, the portions of Mr. Renault's report dealing with them are reproduced. Thus, on Article 33 the report says:

The rules for conditional contraband differ from those laid down for absolute contraband in two respects: (1) There is no question of destination for the enemy in general, but of destination for the use of his armed forces or government departments; (2) the doctrine of continuous voyage is excluded. Articles 33 and 34 refer to the first and Article 35 to the second principle.

The articles included in the list of conditional contraband may serve for peaceful uses as well as for hostile purposes. If from the circum-

[45] Quoted from Professor Westlake's letter to London *Times*, Jan. 31, 1911. For Professor Holland's dissenting opinion, see his letter to the *Times*, dated Feb. 16, 1911, in his "Letters to the Times upon War and Neutrality," 2nd edition (1914), pp. 186–189.

stances the peaceful purpose is clear, their capture is not justified; it is otherwise if a hostile purpose is to be assumed, as, for instance, in the case of food-stuffs destined for an enemy army or fleet, or of coal destined for an enemy fleet. In such a case there is clearly no room for doubt. But what is the solution when the articles are destined for the civil government departments of the enemy state? It may be money sent to a government department for use in the payment of its official salaries, or rails sent to a department of public works. In these cases there is enemy destination which renders the goods liable in the first place to capture and in the second to condemnation. The reasons for this are at once legal and practical. The state is one, although it necessarily acts through different departments. If a civil department may freely receive foodstuffs or money, that department is not the only gainer, but the entire state, including its military administration, gains also, since the general resources of the state are thereby increased. Further, the receipts of a civil department may be considered of greater use to the military administration and directly assigned to the latter. Money or foodstuffs really destined for a civil department may thus come to be used directly for the needs of the army. This possibility, which is always present, shows why destination for the departments of the enemy state is assimilated to that for its armed forces.

It is the departments of the state which are dependent on the central power that are in question and not all the departments which may exist in the enemy state; local and municipal bodies, for instance, are not included, and articles destined for their use would not be contraband.

War may be waged in such circumstances that destination for the use of a civil department can not be suspect, and consequently can not make goods contraband. For instance, there is a war in Europe, and the colonies of the belligerent countries are not in fact affected by it. Foodstuffs or other articles in the list of conditional contraband destined for the use of the civil government of a colony would not be held to be contraband of war, because the considerations adduced above do not apply to their case; the resources of the civil government can not be drawn on for the needs of the war. Gold, silver, or paper money are exceptions, because a sum of money can easily be sent from one end of the world to the other.[49]

Article 34 is thus interpreted:

Contraband articles will not usually be directly addressed to the military authorities or to the government departments of the enemy state. Their true destination will be more or less concealed, and the captor must prove it in order to justify their capture. But it has been thought reasonable to set up presumptions based on the nature of the

[49] Treaties, Conventions, etc., between the United States and other Powers, Vol. 3 (Charles), pp. 300–301.

person to whom, or place from which, the articles are destined. It may be an enemy authority or a trader established in an enemy country who, as a matter of common knowledge, supplies the enemy government with articles of the kind in question. It may be a fortified place belonging to the enemy or a place used as a base, whether of operations or of supply, for the armed forces of the enemy.

This general presumption may not be applied to the merchant vessel herself on her way to a fortified place, though she may in herself be conditional contraband, but only if her destination for the use of the armed forces or government departments of the enemy state is directly proved.

In the absence of the above presumptions, the destination is presumed to be innocent. That is the ordinary law, according to which the captor must prove the illicit character of the goods which he claims to capture.

Finally, all the presumptions thus set up in the interest of the captor or against him may be rebutted. The national tribunals, in the first place, and, in the second, the international court, will exercise their judgment.[50]

The comment on Article 35 is as follows:

As has been said above, the doctrine of continuous voyage is excluded for conditional contraband, which is only liable to capture when it is to be discharged in an enemy port. As soon as the goods are documented for discharge in a neutral port they can no longer be contraband, and no examination will be made as to whether they are to be forwarded to the enemy by sea or land from that neutral port. It is here that the case of absolute contraband is essentially different.

The ship's papers furnish complete proof as to the voyage on which the vessel is engaged and as to the place where the cargo is to be discharged; but this would not be so if the vessel were encountered clearly out of the course which she should follow according to her papers, and unable to give adequate reasons to justify such deviation.

This rule as to the proof furnished by the ship's papers is intended to prevent claims frivolously raised by a cruiser and giving rise to unjustifiable captures. It must not be too literally interpreted, for that would make all frauds easy. Thus it does not hold good when the vessel is encountered at sea clearly out of the course which she ought to have followed, and unable to justify such deviation. The ship's papers are then in contradiction with the true facts and lose all value as evidence; the cruiser will be free to decide according to the merits of the case. In the same way, a search of the vessel may reveal facts which irrefutably prove that her destination or the place where the goods are to be discharged is incorrectly entered in the ship's papers. The commander of

[50] Treaties, Conventions, etc., between the United States and other Powers, Vol. 3 (Charles), p. 301.

the cruiser is then free to judge of the circumstances and capture the vessel or not according to his judgment. To resume, the ship's papers are proof, unless facts show their evidence to be false. This qualification of the value of the ship's papers as proof seems self-evident and unworthy of special mention. The aim has been not to appear to weaken the force of the general rule, which forms a safeguard for neutral trade.

It does not follow that because a single entry in the ship's papers is shown to be false their evidence loses its value as a whole. The entries which can not be proved false retain their value.[51]

It would appear, therefore, that articles of conditional contraband, as defined by Article 24, or as added to the list by subsequent notification, are not subject to confiscation if actually destined to a neutral port, and that they are only exposed to capture if destined for use in war and addressed to enemy authorities for such use, or to a contractor residing within the enemy country who notoriously deals in such articles, so as to assimilate him for such purposes to a governmental authority of the enemy.

The British criterion for conditional contraband is its probable use by the armed forces of the enemy. Thus, in the case of the *Jonge Margaretha*, decided in 1799, Lord Stowell said:

But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use; or whether they were going with a highly probable destination to military use: Of the matter of fact, on which the distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use although occasionally a frigate or other ships of war, may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final application of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.[52]

[51] Treaties, Conventions, etc., Vol. 3 (Charles), pp. 301–302.

[52] 1 C. Robinson, pp. 194–195.

It is believed that food-stuffs for the ordinary, as distinguished from the naval or military, use of the British Islands, may be imported without fear of capture if the various articles of contraband be adopted in the sense in which they were understood by the Conference as interpreted by the official report. Should Great Britain refuse the declaration because of criticism of these articles, belligerents are restrained only by diplomatic protest or war—a situation which substitutes individual preference for collective wisdom, with ultimate decision by an international court.

If, however, the meaning of any of these articles should appear doubtful to the British Government, there could be no objection to an express statement at the time of ratification that the government attaches to the article or articles in question the meaning assigned to them in the report, as recommended by the late Professor Westlake, who says:

> There can, however, be no objection to a reservation in the sense of the Report being appended to our ratification, as we are told it is intended to do in the case of Article 34, to ensure that furnishing conditional contraband to the enemy shall not be interpreted as supplying the civil enemy population but only the enemy government.[53]

In its ratification of the Convention for the Pacific Settlement of International Disputes, the United States explained the sense in which it understood Article 53, which authorizes a temporary tribunal, formed from the so-called Permanent Court of Arbitration of The Hague, to draft the *compromis* upon the request of one of the parties, when diplomacy has failed to reach an agreement upon it, and so far the action of the United States in interpreting this clause in the instrument of ratification has neither been questioned nor criticized.[54]

[53] Professor Westlake's letter to the London *Times*, Feb. 25, 1911.

[54] "*Resolved further*, as a part of this act of ratification, that the United States approves this convention with the understanding that recourse to the permanent court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute; and the United States now exercises the option contained in Article fifty-three of said convention, to exclude the formulation of the 'compromis' by the permanent court, and hereby excludes from the competence of the permanent court the power to frame the 'compromis' required by general or special treaties of arbitration concluded or hereafter to be concluded by the United States, and further expressly declares that the 'compromis' required by any treaty of arbitration to which the United States may be a party shall be settled only by agreement between

Having now considered the two elements which enter into the conception of contraband, namely, the nature of the goods and their destination, the question arises as to the method of enforcing the rights which belligerents are entitled to exercise to prevent neutral trade in contraband as determined by the Declaration. It should be said, however, that a belligerent right does not involve or create a neutral duty, for the neutral nation is not bound to prevent the trade of its subjects or citizens in contraband which the belligerent is entitled to intercept. Neutral commerce is subject to risk. It is not a crime, and as far as the neutral is concerned, it is legitimate; and contracts involving articles of contraband will be upheld and enforced in neutral courts.

On this point Mr. Justice Story's judgment in the case of the *Santissima Trinidad*, decided in 1822, is usually cited. It is perhaps advisable, however, to quote a passage from a recent decision of the Supreme Court of the United States, following and affirming this leading case. Thus, in the Northern Pacific Railway Co. *v.* the American Trading Co., decided in 1904, the court upheld contracts for the sale and transportation of contraband in the following measured language:

> Even if the receivers of the railroad company contracted to forward the lead by the steamer sailing from Tacoma, October 30, it is still insisted that the action of the deputy collector, at Tacoma, in refusing to grant a clearance to the steamship while the lead was on board, made the performance of the agreement not only impossible but unlawful, and for that reason the receivers were absolved from their agreement to forward by that vessel. The contract was not unlawful when made. It may be assumed that the lead was contraband of war, but that fact did not render the contract of transportation illegal nor absolve the carrier from fulfilling it. It is legal to export articles which are contraband of war, but the articles and the ship which carries them are subject to the risk of capture and forfeiture. *The Santissima Trinidad and the St. Ander*, 7 Wheat. 283, 340. Neither any law of the United States nor any provision of international law was violated by the making of this contract, nor by an attempt to export the lead pursuant to its provisions. The case does not come within the principle of Brewster *v.* Kitchell, 1 Salk. 198, where it was said that if one covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed.

the contracting parties, unless such treaty shall expressly provide otherwise." Resolution of ratification by the U. S. Senate, April 2, 1908. (Treaties and Conventions, Vol. 2, p. 2247.)

No act of Congress was passed, subsequently to the making of the contract, which made it unlawful, and it was lawful when made. It is true that the sailing of the vessel without a clearance would have been unlawful, and the deputy collector refused to grant that necessary document while the lead was on board the steamship. But that did not render unlawful the contract to transport. He had the power to refuse to grant the clearance, and he did refuse unless the lead were taken off. In so doing he undoubtedly violated his duty. He was not justified in exacting any such condition for granting the clearance.[55]

The neutral, therefore, is not the agent of the belligerent in the matter of contraband; the belligerent acts for itself and in its own interest. The penalty for contraband is condemnation (Article 39), but only if taken *in transitu* upon the high seas or within the territorial waters of the belligerent, and the vessel is subject to capture throughout the whole of her voyage, even if she is to touch at a point of call before reaching the hostile destination (Article 37); but the successful completion of the voyage prevents condemnation (Article 38). It may be, however, that but a small part of the cargo is contraband, and the question arises, should the vessel be condemned in such circumstances? The Conference answered this question in the negative, and wisely, in Article 40:

A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.

In commenting upon this provision, the learned reporter says:

The consequence is that in order to justify condemnation, it is enough that the contraband should form more than half the cargo by any one of the above standards. This may seem harsh; but, on the other hand, any other system would make fraudulent calculations easy, and, on the other hand, the condemnation of the vessel may be said to be justified when the carriage of contraband formed an important part of her venture.

In the instructions to the British delegates attention is called to the difference of opinion heretofore existing on this subject:

The views of the various Powers as to the liability of the ship carrying the contraband cargo are not altogether in accord. The British principle, speaking generally, is that, apart from any interest of the ship-owners in the contraband cargo, liability to condemnation de-

[55] 195 U. S. 439, pp. 465–466.

pends on the existence of forcible resistance or false papers. The Continental Powers, however, generally import a condition that if the contraband forms either in value or in bulk more than a given proportion of the entire cargo the ship will be liable for condemnation. It seems to His Majesty's Government that there is much to be said for this view. It is certainly, on the whole, favourable to neutrals, assuming the proportion to be fixed to be sufficiently large.[56]

It is scarcely necessary to add that this article is a compromise, or, as the reporter says, "the solution is the mean between those proposed, which varied from one quarter to three quarters." But the provision seems eminently reasonable, if belligerents are to prevent trade in contraband, and there appears to be no doubt that it will commend itself in practice.

Omitting from consideration Articles 41 and 42, which provide for the payment of costs and expenses incurred by the captor when the vessel is released (Article 41) and for the condemnation of that part of the cargo belonging to the owner of the vessel (Article 42),[57] we come to Article 43, which frees from confiscation both vessel and cargo, although permitting the condemnation of the cargo on payment of compensation, in the absence of knowledge of the outbreak of hostilities or of the declaration of contraband, that is to say; of the additions to absolute and conditional contraband in accordance with Articles 23 and 25. This article is not only commendable in itself, but is rendered necessary by the fact that the Second Hague Conference provided that war must be declared and notified, in order to tax neutrals with knowledge and the duties imposed by its existence, and by the further fact that both declaration and notification are essential in blockade and contraband. The text shows that these provisions are conceived in the interest of neutral commerce.

[56] Parliamentary Papers, Miscellaneous No. 4 (1909), p. 24. French practice is thus stated in the memorandum submitted by the French Government: "Vessels and the innocent cargo are released unless the contraband composes three-fourths of the cargo in value, in which case the entire cargo and the vessels are confiscated." *Ibid.*, p. 29.

[57] "The statement of the King's Advocate is in my opinion the law of nations upon this point.—To escape from the contagion of contraband: the innocent articles must be the property of a different owner." Per Lord Stowell in the *Staadt Emden*, 1 C. Robinson, 26, pp. 30–31 (1798).

ARTICLE 43

If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband can not be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband.

A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities, or of the declaration of contraband, respectively, provided such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.

Article 44 is in a sense the continuation and the necessary complement of the previous article and requires neither comment nor justification for present purposes, other than to say that the legitimacy of the seizure which the captor has the right to make in certain circumstances cannot be determined by him, but must be passed upon in a judicial proceeding.

ARTICLE 44

A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent warship.

The delivery of the contraband must be entered by the captor on the log-book of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers.

The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.

It is believed that the chapter dealing with contraband is satisfactory, if it be taken and its provisions applied in the sense in which they are understood and interpreted in the official report, for doubts and difficulties which might arise from the examination of the text are met and overcome by the clear and precise language of the report and the illustrations which it contains. The explanation contained in the report concerning the radius within which vessels attempting to break blockade

are subject to capture harmonizes in fact, if not in theory, Continental and Anglo-American practice, because a careful examination of adjudged cases shows that vessels attempting to enter or to escape from blockaded ports have invariably been captured within the sphere of hostilities, as defined by the Conference and stated in the report.[58] The concession made by Great Britain and the United States, therefore, appears to be rather one of theory than of fact. In the same way, an examination of adjudged cases of capture and confiscation, both of vessels and cargo, shows that the doctrine of continuous voyages, renounced in the case of conditional contraband, is likewise rather a concession of theory than of fact, and that the permission to remove contraband, while permitting the vessel to continue its course, meets what are considered the legitimate rights of the belligerent without too great a disturbance of neutral trade and activity. As in the case of blockade, so in contraband, the Declaration seems to be rather a reconciliation of divergent theories than a compromise of divergent practices, if substance be considered rather than form.

JAMES BROWN SCOTT.

[58] Professor Holland, perhaps the stoutest opponent of the Declaration, seems to concede this in the following passage:

"In defence of the change, it is alleged that of the cases on blockade to be found in the Reports, not one relates to a capture made otherwise than in the neighbourhood of the blockading squadron. Even if this can be shown, it would not prove that no such captures had taken place, or that the mere existence of the rule had not checked blockade-running." (Proposed Changes in Naval Prize Law, 1911, p. 11, footnote.)

[To be concluded in the next number.]

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EDITORIAL COMMENT

MR. BRYAN AND THE THIRD HAGUE PEACE CONFERENCE

The motives which led the Czar of Russia to invite the Powers represented at St. Petersburg to an international conference to consider the steps which could be taken to stop the increase of land and naval armaments, to reduce the expenditure which such armaments and their constant increase necessitate and to maintain peace between nations, lie hidden in the archives of the Russian Government, or are known only to the initiated who hitherto have not felt justified in disclosing them. The results of that Conference, which appropriately met at The Hague on May 18, 1899, the birthday of its illustrious and august initiator, are, however, well known and justified the Czar, however exalted, high-minded or Utopian his motives may have been. It did not, and in the

nature of things it could not, given conditions as they are not what they might be, secure an agreement of the Powers or of any of them to check the growth of armaments or to cut down military and naval budgets. It did, however, something greater. It showed that the nations of the world might meet in conference in times of profound peace to discuss questions of peace and the means by which it might be restored if broken, and maintained if it existed; and it rendered perhaps even a greater service than this by showing that the development of a system of international law, fitted to meet the needs of the nations and to regulate their conduct upon principles of law and justice, was possible.

As a matter of fact, but without going into details, it regulated the conduct of war which it could not abolish by a convention on the laws and customs of war on land. It adapted the Red Cross Convention, more accurately termed the Geneva Convention, for the care of sick and wounded to maritime warfare. It devised a Convention for the Pacific Settlement of International Disputes, providing for temporary tribunals with an easy method of selecting their personnel from a permanent panel of judges, and it supplied a course of arbitral procedure, which it was hoped would be of great service to the nations and which in practice has rendered the services expected. In view of these circumstances it is unnecessary to discuss the question whether the Conference idea and the Conference of 1899 were justified. The first Russian delegate, who was also president of the First Conference, believed that another would be called in the succeeding year and stated his belief to Mr. Andrew D. White, chairman of the American delegation to the Conference. Years slipped by without a call. Russia became engaged in a war with Japan, so that it could not properly take the initiative. In this state of affairs President Roosevelt, at the request of the Interparliamentary Union, which met at St. Louis in connection with the Exposition, sounded the Powers as to their willingness to participate in a Second Conference, in a note bearing the honored signature of John Hay as Secretary of State, and dated October 21, 1904. The replies were favorable, and the Powers were so informed by Mr. Hay in a second note, dated December 16, 1904. The termination of the Russo-Japanese War by the treaty of peace signed at Portsmouth on September 5, 1905, made it possible for the Czar and his advisers to turn their thoughts to peace. President Roosevelt generously relinquished his initiative, and Russia issued a call for a Second Conference.

The First Conference was international in the sense that it deliberated

upon matters of international importance and in the fact that a good many nations—twenty-six in all—took part in its proceedings. It was not international in the sense that all nations recognizing and applying international law in their foreign affairs were invited to participate. The United States and Mexico were the only American nations taking part in it, although it is understood that Brazil was invited also. Another Secretary of State, the Hon. Elihu Root, was unwilling that the nations should go into conference without an invitation addressed to the other republics of America and without their participation. He therefore took steps to secure, and did actually secure, an invitation to every American state, with the result that forty-four nations answered to the roll-call at the opening of the Second Conference at The Hague on June 15, 1907. It is not necessary to enumerate the conventions and declarations negotiated or agreed upon by it, as they are common knowledge and have already entered into the practice of nations. The results of the First Conference were briefly chronicled in order to justify its call, and a statement of the actual results of the Second Conference would serve only to justify the intuition or foresight of its generous initiator. It may be said, however, that it unanimously adopted the principle of compulsory arbitration; that it agreed upon an International Court of Prize, which has unfortunately not yet been established; and that it drafted a Convention for a Permanent International Court, the so-called Court of Arbitral Justice, to be composed of permanent judges, for the trial and judicial determination of controversies between nations with the same ease and certainty as disputes between individuals. This latter court has not been called into being owing to the difficulty of hitting upon a method of appointing the judges, generally acceptable to the Powers represented at the Conference, but the Conference recommended that the court be established through diplomatic channels.

We are not required, however, to commend either the First or the Second Conference, as the latter body declared itself squarely in favor of a Third Conference, to be held approximately in the year 1915, as appears from the text of this important action, which is quoted in full:

> Finally, the conference recommends to the Powers the assembly of a Third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding conference, at a date to be fixed by common agreement between the Powers, and it calls their attention to the necessity of preparing the programme of this Third Conference a sufficient time in advance to ensure its deliberations being conducted with the necessary authority and expedition.

In order to attain this object the conference considers that it would be very desirable that, some two years before the probable date of the meeting, a preparatory committee should be charged by the governments with the task of collecting the various proposals to be submitted to the conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a programme, which the governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested. This committee should further be intrusted with the task of proposing a system of organization and procedure for the conference itself.

What is everybody's business is proverbially nobody's business, and the year 1913 has been allowed to slip by without the appointment of a preparatory committee, which should have been appointed if the Conference was to meet two years later. A second President of the United States, the Hon. Woodrow Wilson, has taken the initiative, and his Secretary of State, the Hon. William Jennings Bryan, issued on January 31, 1914, a circular letter to the diplomatic agents of the United States accredited to the governments participating in the Second Conference, in order to secure an agreement for the meeting of the Third Conference in accordance with the recommendation of the Second, in the course of the year 1915, and suggesting that the preparatory committee referred to should be composed of the Administrative Council of the Permanent Court of Arbitration at The Hague, from which a subcommittee of its members might be formed, in order to prepare the details of the Conference, to report to the full committee, which in turn would communicate directly with the home governments, thus obviating the difficulties of appointing a preparatory committee of a small number of Powers and the delays which would be necessarily incurred. It is not known what action has been taken upon this note, but the President and the Secretary of State are to be congratulated upon the stand they have taken, reasonable in itself and in accord with sound precedent. It would be interesting, but it would be futile in this part of the Journal, to enumerate the subjects which might properly form the program or to consider the organization and procedure of the Conference to be devised by the preparatory committee. It is sufficient for present purposes to show that the Secretary of State has followed in the footsteps of an illustrious predecessor by setting in motion the machinery which called into being the Second and which is calculated to bring about the meeting of the Third Conference. Initiative is the great factor in such matters and the initiative has been taken, and in view of the importance of the step and of the immense services which a Third Conference could render by the

results of its predecessors, Mr. Bryan's note is printed in full as an appendix to the present comment.

It should be said, in conclusion, that in addition to a general unwillingness of some of the great Powers to meet in conference with what they are pleased to consider their inferiors, and to discuss in their presence matters of international concern which have heretofore been determined behind closed doors by a small number of self-appointed legislators and imposed upon the world at large, there appears to be a reason why the Conference should not meet at the time appointed, which has been advanced in certain quarters; namely, the failure of some of the Powers—notably Great Britain—to ratify the actions of the Second Conference. The Prize Court Convention provided in its seventh article that the proposed court should, in default of generally recognized principles of international law, decide the cases submitted to it "in accordance with the general principles of justice and equity." Great Britain was unwilling to invest judges with what might be considered legislative functions, and a conference of ten maritime Powers, called the International Naval Conference, met at London upon the invitation of Great Britain, from December 4, 1908, to February 26, 1909. Its deliberations took the form of a Declaration, which it was hoped would supply the law to be administered by the court under Article 7 and which the Powers not invited to the Conference would gladly accept. But Great Britain itself has not ratified the Declaration, although it signed it, and the bill introduced into Parliament modifying prize court procedure in accordance with the Prize Court Convention and the Declaration of London was thrown out by the Lords on December 12, 1911. Certain Powers, it is understood, object to the meeting of a Third Conference before Great Britain shall have ratified the Declaration of London and the Prize Court shall be established. It is of course essential that the agreements of the Conferences shall be ratified and put into effect, but the lesson to be drawn from the failure to establish the Prize Court is rather that provisions should not be incorporated in international agreements which are incapable of ratification than that a subsequent Conference should not meet until they had been ratified. There is indeed merit in the contention, but it is believed that it is more specious than real. The business of the world should not be blocked because of one Power's failure to ratify a convention or two, and the good of the international body politic should not be subordinated to the ratification of a single convention, which, however important in itself, was not essential to the success of

the Second Conference and is not in fact necessary as a preliminary to the meeting of the Third.

DEPARTMENT OF STATE

WASHINGTON, *January* 31, 1914.

TO THE DIPLOMATIC OFFICERS OF THE UNITED STATES ACCREDITED TO THE GOVERNMENTS WHICH TOOK PART IN THE SECOND INTERNATIONAL PEACE CONFERENCE AT THE HAGUE

Gentlemen:

By the Final Act of the Second Peace Conference at The Hague in 1907 it was recommended to the Powers that a Third Peace Conference should be held within a period corresponding to that which had elapsed since the preceding Conference, at a date to be fixed by common agreement between the Powers, and attention was called to the necessity of preparing a program of the Third Conference a sufficient time in advance to ensure the conduct of the deliberations of the Conference with the necessary authority and expedition.

In order to attain this object it was by the Final Act further declared to be very desirable that, some two years before the probable date of the meeting, a preparatory committee should be charged by the Governments with the task of collecting the various proposals which might be brought forward for submission to the Conference, of ascertaining what subjects were ripe for embodiment in an international regulation, and of preparing a program for the Conference. It was also proposed that this committee should be entrusted with the task of formulating for the Conference a system of organization and procedure.

On June 10, 1912, the President of the United States appointed an advisory committee to this Government to consider proposals for a program for the next Conference. This committee has submitted an elaborate preliminary report. The necessary steps have not, however, been taken by the governments concerned for the appointment of the international preparatory committee contemplated by the Final Act of the last Conference. It having been in effect recommended to the Powers by the last Conference that the Third Conference should be held within a period of eight years, which would make the meeting fall in the year 1915, a space of a year and a half still remains within which the preparation of the program may be accomplished. This is a period much longer than that which was found to be sufficient for the preparation of the programs of the First and Second Conferences.

With a view to facilitate the consideration and preparation of the program of the next Conference, the President desires you immediately to propose to the governments to which you are respectively accredited that the duties of the international preparatory committee shall be committed to the Administrative Council of the Permanent Court of Arbitration at The Hague, this Council being composed of the Netherlands Minister of Foreign Affairs and the diplomatic representatives of the Contracting Powers accredited to The Hague. To this Council the task of preparation for the Conference may readily and appropriately be committed. The place at which the Council sits leaves nothing to be desired from the point of view of con-

venience, while the entrusting of the work to a competent body already in existence would result in an appreciable saving both in time and in expense. If the membership of the Council were found to be too large for the efficient carrying on of the work in detail, this difficulty could at once be solved by the appointment of subcommittees to deal with particular subjects.

I am, Gentlemen,

Your obedient servant,

WILLIAM JENNINGS BRYAN.

THE APPOINTMENT OF MR. ROBERT LANSING OF NEW YORK AS COUNSELOR OF THE DEPARTMENT OF STATE

On March 27, 1914, Mr. Robert Lansing was confirmed as Counselor of the Department of State and took the oath of office on the first day of April. The position to which Mr. Lansing was appointed, it is understood upon the personal recommendation of Secretary Bryan, is in itself of the greatest importance not only because he is second in authority to the Secretary, but is Acting Secretary of State during his absence, and in view of the delicate and intricate problems of international law confronting the Department, upon whose successful determination the honor and prestige of the United States depend, the position assumes a dignity and importance, which it is difficult to overestimate. It is no doubt a consolation to the authorities, as it is a source of pride to the American Society of International Law, of which he was a founder, and to its Journal, of which he is an editor, that Mr. Lansing has been chosen, and that he has consented to accept the position of Counselor of the Department of State.

His training for the post has more than prepared him for the performance of its duties, as is evidenced by a summary statement of his career. He was born at Watertown in the State of New York on October 17, 1864, the son of an eminent lawyer and descendant of a family closely identified with the history of New York. He graduated from Amherst College in 1886, and three years later began the practice of law at Watertown and has since continued in private practice except when retained by his own and foreign governments in important cases, the list of which is large and imposing. In 1892 he was appointed associate counsel for the United States in the Fur Seal Arbitration and attended the sessions of the international tribunal held in Paris in 1893. In 1894–5 he was counsel for the Mexican and Chinese Legations at Washington. In 1896 he was appointed by Mr. Richard Olney, then Secretary of State, coun-

sel for the government before the Bering Sea Claims Commission and as such attended the Commission as representative of this government at its sessions held in Victoria, British Columbia, in 1896–7, and at Montreal and Halifax in the latter year. He was counsel for private parties before the Canadian Joint High Commission in 1898–9 and counselor for the Mexican and Chinese Legations at Washington in 1900–1. He was solicitor and counsel for the government before the Alaskan Boundary Tribunal in 1903 and attended the sessions of the tribunal at London in his official capacity. He was counsel for private parties in the Venezuelan asphalt disputes in 1905; counsel for the United States in the Atlantic Fisheries Arbitration at The Hague in 1908, and as such counsel attended the sessions of the Hague Tribunal which decided this long-standing and important dispute in 1910. He was technical delegate of the government in the Fur Seal Conference at Washington in 1911, and special counsel for the Department of State on various pending diplomatic questions and for the negotiation with Great Britain of the claims to be arbitrated under the special agreement of 1910; in 1911 counsel for the United States before the American and British Claims Arbitration, and from 1913 to the date of his appointment as Counselor, he was agent of the United States before this Commission.

Such in brief is the experience which he has had in the practice of international law. His interest, however, in his favorite subject has been theoretical as well as practical, for he was one of the founders of the American Society of International Law in 1906 and has been since its foundation a member of its executive committee. He was intimately associated with the establishment of the American Journal of International Law in 1907, from which date he has been an editor of the Journal, and he has from time to time, as his professional engagements would permit, contributed to it articles, editorial comments and book reviews. In addition to this, he is author of a text book on civil government, entitled *Government, its Origin, Growth and Form in the United States* (1902), and also of numerous articles and addresses on diplomatic questions and subjects pertaining to international law and arbitration.

Mr. Lansing has represented the United States, it is believed, in more international arbitrations than any living American, and he has had a longer and broader experience in international arbitration and has appeared more frequently before arbitral tribunals than any living lawyer. It is an interesting fact, and not without significance, that, although a consistent Democrat, Mr. Lansing has been repeatedly appointed to

represent his country by Republican administrations, a statement more eloquent than labored comment upon his abilities and attainments. It should be said, in conclusion, that Mr. Lansing, in addition to the sterling qualities which have justified and indeed dictated his selection for his present post, possesses the grace and charm of manner so essential in diplomatic intercourse, and that in fact as well as in theory he is a high-minded and Christian gentleman.

ARBITRATION OF CLAIMS RELATING TO RELIGIOUS PROPERTIES BETWEEN FRANCE, GREAT BRITAIN, SPAIN, AND PORTUGAL

On July 31, 1913, a special agreement—technically called in French a *compromis*—was signed by representatives of France, Great Britain, Spain and Portugal for the submission to the arbitration of a special tribunal, to be constituted and to sit at The Hague, of "claims relating to the properties of the French, British and Spanish nationals, expropriated by the Government of the Portuguese Republic after the proclamation of the Republic." It is important to note in this connection certain details of the procedure to be followed by the tribunal and to state its membership.

A tribunal of five with elaborate oral arguments before it by agents or counsel, as provided by the Convention for the Pacific Settlement of International Disputes of 1899, has been found in practice to be less satisfactory than a smaller tribunal with summary procedure. At the Second Hague Conference the French delegation proposed an addition to the convention, providing for a tribunal of three with little or no oral argument. It was believed that this tribunal would be more satisfactory in small technical questions, and that the proceedings before it should be written, in the sense that the contentions of plaintiff and defendant, to use a technical term of municipal law, should be prepared, printed, and submitted to the arbitrators in session at The Hague, who should base their judgment primarily upon these documents, although agents or counsel of the contending parties should be present and give explanations upon any point or points suggested by the tribunal. This system of summary procedure was embodied in Chapter IV of the Convention of 1907, the five articles of which read as follows:

ARTICLE 86

With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the contracting Powers adopt the following rules,

which shall be observed in the absence of other arrangements and subject to the reservation that the provisions of Chapter III apply so far as may be.

ARTICLE 87

Each of the parties in dispute appoints an arbitrator. The two arbitrators thus selected choose an umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the members of the Permanent Court exclusive of the members appointed by either of the parties and not being nationals of either of them; which of the candidates thus proposed shall be the umpire is determined by lot.

ARTICLE 88

In the absence of any previous agreement the tribunal, as soon as it is formed, settles the time within which the two parties must submit their respective cases to it.

ARTICLE 89

Each party is represented before the tribunal by an agent, who serves as intermediary between the tribunal and the government who appointed him.

ARTICLE 90

The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts should be called. The tribunal has, for its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in court it may consider useful.

It will be observed that the procedure laid down in the above articles may be varied by agreement of the parties, and this is what has happened in the present case, although the arbitration is to be conducted in general accord with Chapter IV of the Convention of 1907.

It was foreseen that the decision of the cases might require oral explanations for their good understanding, and that the claims of the different governments might require or justify the appointment of agents to represent them before the tribunal. Hence Article 8 authorizes Portugal to appoint one or three agents to represent it, with the right of each plaintiff to appoint a separate agent or to agree upon one and the same agent, if they desire. It was further provided that the agents may be assisted by counsel. The extent to which additional information may be required is, by Article 5, vested in the discretion of the tribunal, which may, "if it shall deem it necessary, ask either of the agents to furnish it with oral or written explanations, to which the agent of the opposite party shall have the right to reply," and the fact that counsel may be appointed by each country to assist the agents leads to the conclusion

that something very much like oral argument may be permitted. The written documents are, according to the terms of the same article, a case (*mémoire*) by the claimant government, to be presented within four months of the date of the agreement, and a counter-case of Portugal to be presented within six months from the filing of the case. The claimant government may present a written rejoinder at least three weeks before the first meeting of the tribunal, and Portugal reserves the right for "such period of three weeks, and up to the date of the aforesaid meeting, to answer by a counter-reply." As is usual in such cases, the time agreed upon has been extended, so that the tribunal will not meet at the date originally fixed. The tribunal is to meet upon the call of its president, each case is to be examined successively and in the alphabetical order of the parties at interest, and each claim shall be the subject of a separate award (Article 4), to be rendered "within fifteen days following the taking of the claim under deliberation" (Article 10). French is the language to be used, and papers and documents in any other language are not to be produced except by authorization or special permission accorded by the tribunal, unless accompanied by a French translation duly certified (Article 7). The tribunal is to examine and to decide the claims "in accordance with the conventional rights applicable thereto, or, that failing, according to the general provisions and principles of law and equity" (Article 3), and it is declared competent "to determine the condition under which its awards shall be executed," (Article 9).

The agreement contains a provision unusual in such documents, as it states the honorarium which the members are to receive for their services at The Hague, as well as in the preparation of the case, and provides a fund from which the expenses shall be paid. Article 11 dealing with this matter is as follows:

> The honorarium of the members of the tribunal shall be fixed at the rate of 1,200 francs per week, traveling and resident expenses included; it being understood that four weeks shall be allowed in view of the necessary study of the case and counter-case before the meeting of the tribunal. The honorarium pertaining to these four weeks shall be paid to the arbitrators the day of the first meeting of the tribunal.
>
> Each of the parties shall pay over to the Bureau of the Permanent Court of Arbitration at The Hague, at the time of presenting his case and by way of provisional deposit, the sum of 3,000 florins (Dutch).

Notwithstanding its unusual nature, the article is believed to be a wise departure from the practice of nations in such matters, as it enables the arbitrator, before his acceptance, to know the exact remuneration

which he is to receive, and places at his disposal the honorarium for the four weeks which he is presumed to spend in the preparation of the case before he proceeds to pass upon it as a judge of the tribunal at The Hague.

The litigating nations did not need to resort to Article 87 of the Hague Convention for the appointment of the judges, as they agreed in advance upon the members of the tribunal, all of whom are strangers to the controversy. Its members are Jonkheer Savornin Lohman of Holland and Mr. Lardy of Switzerland, both tried and experienced arbitrators, and it is a very great satisfaction to the people of the United States and especially to the American Society of International Law to note that its honored president, Mr. Elihu Root, has been chosen by the nations in controversy as president of the tribunal. The text of the *compromis* is printed in the Supplement, p. 165.

ARBITRATION AND PEACE TREATIES

In an editorial comment in this Journal for October last a comparison was made of the form of treaties, a series of which are being negotiated by Mr. Bryan and which have come to be commonly known as the Bryan peace treaties, with the unratified arbitration treaties of 1911 and the series of general arbitration treaties negotiated by Secretary Root in 1908.

Since that time, the efforts of Secretary Bryan to negotiate this form of treaties have been attended with considerable success. At the date of the present writing, no less than thirty-four governments have accepted it in principle, namely, Italy, Great Britain, France, Brazil, Sweden, Norway, Russia, Peru, Austria, Netherlands, Bolivia, Germany, Argentina, China, Dominican Republic, Guatemala, Haiti, Spain, Portugal, Belgium, Denmark, Chile, Cuba, Costa Rica, Salvador, Switzerland, Paraguay, Panama, Honduras, Nicaragua, Japan, Persia, Ecuador and Venezuela. Of the governments which have accepted the form of treaty in principle, fourteen have already attached their signatures to treaties, as follows: Salvador, August 7, 1913; Guatemala, September 20, 1913; Panama, September 20, 1913; Honduras, November 3, 1913; Nicaragua, December 17, 1913; Netherlands, December 18, 1913; Bolivia, January 22, 1914; Portugal, February 4, 1914; Persia, February 4, 1914; Costa Rica, February 13, 1914; Switzerland, February 15, 1914; Dominican Republic, February 17, 1914; Venezuela, March 21,

1914; and Denmark, April 17, 1914. The texts of all these treaties have not yet been published, but it is assumed that they follow the text of the treaty with Salvador which was published last summer and which appears in the October 1913 number of the Journal at pages 824–825.

As was explained in the editorial referred to, the new treaties are not intended as substitutes for the general arbitration treaties negotiated by Secretary Root, as was the case with the Knox treaties of 1911, but are intended to accompany and complement them. Secretary Bryan has accordingly negotiated renewals of the general arbitration treaties of 1908 which terminated at the expiration of five years. The renewals negotiated to date are as follows: With France, February 13, 1913, extending the treaty of February 10, 1908, which expired February 27, 1913; with Spain, May 29, 1913, extending the treaty of April 20, 1908, which expired June 2, 1913; with Great Britain, May 31, 1913, extending the treaty of April 4, 1908, which expired June 4, 1913; with Norway, June 16, 1913, extending the treaty of April 4, 1908, which expired June 24, 1913; with Sweden, June 28, 1913, extending the treaty of May 2, 1908, which expired August 18, 1913; with Japan, June 28, 1913, extending the treaty of May 5, 1908, which expired August 24, 1913; with Portugal, June 28, 1913, extending the treaty of April 6, 1908, which expired November 14, 1913; with Switzerland, November 3, 1913, extending the treaty of February 29, 1908, which expired December 23, 1913; with Italy, May 28, 1913, extending the treaty of March 28, 1908, which expired January 22, 1914; with Costa Rica, March 16, 1914, extending the treaty of January 13, 1909, which expires July 20, 1914; with Paraguay, March 2, 1914, extending the treaty of March 13, 1909, which expires October 2, 1914.

The renewals uniformly cover another period of five years.

The treaty negotiated with the Dominican Republic on February 17, 1914, contains not only the provisions of the Bryan treaties, but also of the provisions of general arbitration treaties of 1908, Secretary Root not having negotiated a general arbitration treaty with the Dominican Republic.

The United States Senate has consented to the ratification of the renewal of the general arbitration treaties, and ratifications have already been exchanged with France, Spain, Great Britain, Norway, Sweden and Italy.

Secretary Bryan had not at the date of this writing submitted to the Senate for ratification any of the treaties negotiated by him but, as said

in the former editorial referred to, it is understood that the Senate Committee on Foreign Relations approved the draft of these treaties and it is not expected, therefore, that any objection will be raised by the Senate to their ratification.

The renewal of the general arbitration treaties and the success attending the negotiation of the Bryan peace treaties will go far toward restoring the United States to the position of leadership in the cause of international arbitration and peace which it occupied prior to the unfavorable action of the Senate upon the arbitration treaties of 1911.

IN MEMORIAM

The year 1913 has been one full of regret and of sorrow to workers in the field of international law, public and private, for they have lost colleagues and friends in international law properly so called and in the conflict of laws, in the deaths of John Westlake, T. M. C. Asser, Ludwig von Bar, Frederick Meili, and Emanuel von Ullmann. An appreciation of Professor Westlake has already appeared in the Journal. The present comment chronicles, briefly and inadequately, the careers and services of Messrs. Asser, von Ullmann, von Bar, and Meili.

T. M. C. Asser

Mr. T. M. C. Asser, an honorary member of the Institute of International Law, of which he was one of the founders, was born in Holland on April 28, 1838. A lawyer by training, a professor for years at the University of Amsterdam and Councilor of State of his native country, he was the author of an admirable treatise on international private law, written in Dutch and translated into French by his friend, Alphonse Rivier, as well as of various contributions to international law, public and private. He initiated the Hague Conferences on International Private Law, which have rendered such services to the conflict of laws, and was the delegate of his country to the First and Second Hague Peace Conferences, in each of which he rendered distinguished and devoted service. Lastly, but not least, he took in hand the establishment of an Academy of International Law to be installed in the Peace Palace at The Hague, and it is a matter of profound regret to his many friends and admirers that he did not live to see its foundation, a hope which he

expressed on more than one occasion by word of mouth and in writing to the author of this brief note. At the time of his death, on July 29, 1913, he was the choice of the Institute of International Law for honorary president to succeed Professor Westlake, his lifelong friend and colleague in creating the *Revue de droit international et de législation comparée*—the first journal of international law—and the Institute of International Law, organized in 1873.

Mr. Asser was also well known as an arbiter of international disputes, and as a member of the Permanent Court of Arbitration he took part in the decision of the first case, the Pius Fund Dispute between the United States and Mexico, submitted to and decided by a special tribunal of the Permanent Court, which he had as delegate to the First Hague Conference helped to create. Mr. Asser was an admirable linguist, speaking German with ease and grace, French with the accent, fluency and precision of a native, and English with little or no trace of a foreign accent. Leaving out of consideration the value of his contributions to international law, public and private, he created or was associated in the creation of agencies both calculated to develop and to popularize his favorite studies. *The Revue de droit international et de législation comparée*, of which he was one of the founders, supplied both branches of international law with an organ for their scientific treatment and exposition. As initiator of the Conferences on Private International Law, which have been held from time to time at The Hague, he created an instrument for its development and codification. As one of the founders of the Institute of International Law he called into being an instrument for the scientific development of both branches of the subject, and by his activity in the establishment of the Academy of International Law at The Hague, he provided an institution for their scientific exposition. It is not given to many men to take part in such important creations, and the evidences of his constructive imagination and his well directed zeal will long survive him and make his name one to conjure with in the international world.

Emanuel von Ullmann

Emanuel von Ullmann, professor of international law at the University of Munich, was born in Pertowitz, Bohemia, on February 28, 1841, and died at Vienna on April 14, 1913. For many years his interest lay in constitutional and in criminal law rather than in the law of nations, and it was only from 1889, when he succeeded von Holtzendorff at

Munich, that he turned his chief attention to international law, in which subject he became a specialist and a recognized authority. It was natural that a man born in Austria or in an Austrian possession, and still a young man when the compromise was reached with Hungary, should have devoted himself primarily to constitutional law, for the situation of the dual monarchy opened up many and inviting questions of theory as well as practice. The training thus had in constitutional law was later to be of great service to him in international law. At the same time he devoted much thought and attention to criminal law and before he became an internationalist his reputation was that of an authority on criminal law, and he has to his credit not only a treatise on Austrian criminal procedure (1874–1879, second edition 1882) but also a treatise on German criminal procedure published in 1893, but four years after his transfer from Vienna, where he was professor, to the University of Munich. It is, however, as a teacher and writer on international law that he was chiefly known in his later years. It was to be expected that von Holtzendorff's successor would feel obliged to lecture on international law, and von Ullmann not only complied with the obligation but welcomed it. His interest in the subject was of long standing, for early in his academic career he had lectured on international law at Innspruck. He devoted five hours a week to international law in each semester, and often gave additional lectures in the university on various phases of the law of nations. In 1898 he made his formal appearance as a writer on international law considered as a system by the publication of his "Völkerrecht" as a part of the *Handbuch des öffentlichen Rechts der Gegenwart*. This work gave him an assured position among internationalists, although it was far from easy reading. A second edition, thoroughly revised and in part rewritten so as to become practically a new work, appeared in 1909. The second edition is especially remarkable for its warm appreciation of the Hague Conferences at a time when they were looked upon in Germany as somewhat Utopian and their vast importance in the development of international law overlooked, and it is understood that he contemplated and had in preparation a third edition of this work.

Without neglecting any part of the international field, von Ullmann was especially interested in neutrality, particularly that part of the subject dealing with maritime warfare, as shown by his rector's address entitled *Der deutsche Seehandel und das Seekriegs- und Neutralitätsrecht* (1900), and his recent monograph entitled *Die Fortbildung des Seekriegs-*

rechts durch die Londoner Deklaration vom 26. Februar 1909.[1] It has been stated that he believed in the Hague Conferences when such belief was neither general nor popular, and he confessed his faith in a monograph, *Die Haagerkonferenz von 1899 und die Weiterbildung des Völkerrechts.*[2] More recently he allowed himself to be drawn from the study and the university to take part in the *Verband für internationalen Verständigung*, of which he was a founder and the first president.

Professor von Ullmann became an associate of the Institute of International Law in 1898 and a member in 1904, and, although he attended its sessions and took great interest in its proceedings, as is evident by the use of them which he made in his treatise on international law, he was nevertheless what might be called a silent member. Gentle and dignified in bearing, sympathetic and courteous in intercourse, deeply learned in his chosen profession, he has passed away regretted alike by his friends and co-workers in international law.

Ludwig von Bar

Professor von Bar, born in Hanover in 1836, began his academic career at the University of Göttingen in 1863, and after professorships at the University of Rostock (1866) and Breslau (1868) returned (1879) to Göttingen, from which university he received the doctor's degree and with which he was connected at the time of his death, on August 20, 1913, while returning from the session of the Institute of International Law at Oxford. Essentially a professor, he nevertheless took an active part in politics, was a member of the Reichstag from 1890 to 1893, and was both then and thereafter an advanced liberal. A member of the Institute of International Law from its foundation, he was president of it in 1891 and took during his long membership an exceedingly active and important part in its proceedings. He was also a member of the Permanent Court of Arbitration of The Hague.

Thoroughly versed in international law, or, as it is sometimes called, especially on the continent, public international law, it was as a writer on international private law that he is chiefly known. His *Das internationale Privat- und Strafrecht* appeared in 1862 and was translated into English in 1883 by G. R. Gillespie, under the title *International Law, Private and Criminal.* His second great work, *Theorie und Praxis des*

[1] Jahrbuch des öffentlichen Rechts, Vol. 4 (1910), pp. 1–55.
[2] *Ibid.*, Vol. 1 (1907), pp. 82–136.

internationalen Privatsrechts (2 volumes, 1889), the result of more than twenty years' thought and reflection, likewise dealt with international law and was translated into English by Mr. Gillespie under the title of *The Theory and Practice of Private International Law.* From the date of their publication until the present day these works have been looked upon as authorities both at home and abroad. Essentially practical, he was nevertheless deeply versed in theory. He did not accept theory, however, and find support for it in practice. He analyzed both and tested them in the light of history. He was thus at one and the same time historian, philosopher, and jurist within his chosen field.

Those who have not had the pleasure of knowing Professor von Bar cannot gather from his large and weighty volumes the charm of manner, the felicity of expression, the keenness and subtle sense of humor, which made association with him a constant joy and an abiding memory. His very peculiarities were attractive, of which one may perhaps be mentioned for which he had good precedent, if precedent were needed. It is said of the philosopher Kant that he was accustomed to single out a student and lecture to him, and that one young man who enjoyed the distinction felt it necessary to make some changes in his dress and personal appearance. These distressed the philosopher, who appeared ill at ease at his next lecture. He sent for the young man and asked him if he would not be good enough to allow in future as in the past a button on his coat to hang loosely from the garment, as he had been accustomed to fix his eye on this when lecturing. If the loss of a button disturbed the philosopher of Königsberg, the loss of his lead pencil would have ruined the jurist of Göttingen as a public speaker, because instead of eyeing his audience or indeed of speaking to it, Professor von Bar apparently devoted his attention to a lead pencil, like himself diminutive, which he held at a distance on beginning his remarks and drew nearer and nearer to his eyes the longer he spoke until it almost threatened, so it seemed to his auditors, his vision. Great in his calling, modest, as we like to think greatness should be, attractive in all his ways, he died rich in honor and in the fulness of years.

Friedrich Meili

Professor Friedrich Meili, the distinguished international jurist, died at his home in Zurich, Switzerland, on January 15, 1914, in the 66th year of his age. To the development of international legal science, more particularly in respect of private rights, he devoted the best years of his

life. He brought to his work a fervor born of a conviction that the modern development of the means of intercourse and communication among the nations, requires a broader legal science, in which selfish local prejudices must surrender to the greater needs of the international community. Indeed, it was through the study of the law applicable to the new means of intercourse, the railroad, the telegraph and telephone, that he was gradually led into the international field.

The essentially practical trend of his thought and writings was due to his long experience at the Bar. In 1885, however, he became professor of law at the University of Zurich and later gradually abandoned his practice. In 1904 he received the designation of professor of private international law, which was probably the first time that a separate chair in this field was created in any faculty. He was a member of the Institute of International Law and also represented his country as a delegate at all of the four conferences thus far held at The Hague upon private international law. His arguments were always lucid and forceful, and fortified by a wealth of practical experience gained from actual contact with life. It was this which made Professor Meili's opinions widely sought in great international cases. He advised the Governments of Denmark and Austria in important litigation; he was retained by Portugal in the Delagoa Bay controversy; by the shareholders of the Netherland-South African Railroad Company against Great Britain; and by Russia in the German Bank Deposits case, in all of which he was eminently successful.

He was a prolific writer in his chosen field; indeed, those who were not fully aware of the circumstances, often wondered how one large volume could follow another so closely, consistent with adequate preparation and reflection. But the many treatises which he published within the ten years preceding his death, were in reality the work of a lifetime, the result of patient research and of an accumulation of notes gathered throughout his active career. In 1902, he published his *Handbuch des internationalen Civil und Handelsrechts* (which was translated also into English and Japanese); in 1904, *Das internationale Civilprozessrecht;* in 1909, *Das Lehrbuch des internationalen Konkursrechtes;* and in 1910, *Das Lehrbuch des internationalen Strafrechtes und Strafprozessrechtes.* He was one of the first to attempt to work out a jurisprudence for aërial navigation.

Professor Meili was unusually well equipped for work in the fields of comparative and international law through his wide knowledge of both

ancient and modern languages. He spoke English fluently and became acquainted with many of our American lawyers and publicists through his visit to St. Louis in 1904, where he read a paper at the invitation of the American Bar Association. He was a man of the broadest sympathies; nor did his scholarly attainments tempt him to forget the social purpose to be subserved by all law. He served Justitia well, but he also made her the handmaiden to international commerce and intercourse.

THE CARNEGIE CHURCH PEACE UNION

Mr. Carnegie's purse-strings have again been opened in behalf of international peace, and the fund at his disposal for this purpose seems to be inexhaustible. On December 14, 1910, he established an organization known as the Carnegie Endowment for International Peace, with a capital of ten million dollars, the income from which is $500,000 annually; and on February 10, 1914, he created a new organization, the Carnegie Church Peace Union, with a capital of two million dollars and the income thereon estimated at $100,000 annually.

The following is the Board of Trustees for the administration of the fund, composed of representatives of different religious denominations and of prominent lay advocates of international peace:

Rev. Peter Ainslie, Baltimore; Rev. Arthur J. Brown, New York; Rev. Francis E. Clark, Boston; President W. H. Faunce, Providence, R. I.; Cardinal Gibbons, Baltimore; Archbishop J. J. Glennon, St. Louis; Bishop David H. Greer, New York; Rev. Frank O. Hall, New York; Bishop E. R. Hendrix, Kansas City; Rabbi Emil G. Hirsch, Chicago; Hamilton Holt, New York; Professor William I. Hull, Swarthmore, Pa.; Rev. Charles E. Jefferson, New York; Rev. Jenkin Lloyd Jones, Chicago; Bishop William Lawrence, Boston; Rev. Frederick Lynch, New York; Rev. C. S. Macfarland, New York; Marcus M. Marks, New York; Dean Shailer Matthews, Chicago; Edwin D. Mead, Boston; Rev. William Pierson Merrill, New York; John R. Mott, New York; George A. Plimpton, New York; Rev. Junius B. Remensnyder, New York; Judge Henry Wade Rogers, New Haven, Conn.; Dr. Robert E. Speer, New York; Francis Lynde Stetson, New York; Dr. James J. Walsh, New York; Bishop Luther B. Wilson, New York.

The officers of the Union are David H. Greer, President; William P. Merrill, Vice President; Frederick Lynch, Secretary; George A. Plimpton, Treasurer. Two committees were appointed: namely, an executive

committee composed of Messrs. Charles E. Jefferson, Hamilton Holt, William I. Hull, C. S. Macfarland, Edwin D. Mead, Robert E. Speer, James J. Walsh; and a finance committee, consisting of Messrs. George A. Plimpton, Francis L. Stetson, Marcus M. Marks.

It is to be presumed that the Union will seek to enlist actively religious bodies in behalf of international peace. The wise expenditure of the income of such a large fund will require the best thought of the Trustees and much time to mature its plans. The ideas which prompted the generous donor to make the gift are contained in an address which he delivered at a luncheon to his Trustees at his residence on February 10, 1914, and it is quoted in full:

Gentlemen of many religious bodies, all irrevocably opposed to war and devoted advocates of peace: We all feel, I believe, that the killing of man by man in battle is barbaric, and negatives our claim to civilization. This crime we wish to banish from the earth; some progress has already been made in this direction; but recently men have shed more of their fellows' blood than for years previously. We need to be aroused to our duty and banish war.

Certain that the strongest appeal that can be made is to members of the religious bodies, to you I hereby appeal, hoping you will feel it to be not only your duty, but your pleasure, to undertake the administration of $2,000,000 of 5 per cent bonds, the income to be so used as in your judgment will most successfully appeal to the people in the cause of peace through arbitration of international disputes; that as man in civilized lands is compelled by law to submit personal disputes to courts of law, so nations shall appeal to the Court at The Hague, or to such tribunals as may be mutually agreed upon, and bow to the verdict rendered, thus insuring the reign of national peace through international law. When the day arrives, either through such courts of law or through other channels, this Trust shall have fulfilled its mission.

After the arbitration of international disputes is established and war abolished, as it certainly will be some day, and that sooner than expected, probably by the Teutonic nations, Germany, Britain, and the United States first deciding to act in unison, other powers joining later, the trustees will divert the revenues of this fund to relieve the deserving poor and afflicted in their distress, especially those who have struggled long and earnestly against misfortune and have not themselves altogether to blame for their poverty. Members of the various churches will naturally know such members well, and can therefore the better judge; but this does not debar them from going beyond membership when that is necessary or desirable. As a general rule, it is best to help those who help themselves; but there are unfortunates from whom this cannot be expected.

After war is abolished by the leading nations, the trustees, by a vote of two-thirds, may decide that a better use for the funds than those named in the preceding paragraph has been found, and are free, according to their own judgment, to devote the income to the best advantage for the good of their fellow-men.

Trustees shall be reimbursed for all expenses, including traveling expenses, and to each annual meeting, expenses of wife or daughter.

Happy in the belief that the civilized world will not, cannot, long enter a profession which binds them to go forth and kill their fellow-men as ordered, although they will continue to defend their homes, if attacked, as a duty, which also involves the duty of never attacking the homes of others, I am,

Cordially yours,

ANDREW CARNEGIE.

Every generous and high-minded man, irrespective of church and of nationality, must from the bottom of his heart hope and pray that the cause so generously endowed by Mr. Carnegie will ultimately triumph and must wish the new organization and its trustees Godspeed in their delicate, important and wholly disinterested mission.

THE ACADEMY OF INTERNATIONAL LAW AT THE HAGUE ESTABLISHED IN CO-OPERATION WITH THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

The establishment of an Academy of International Law at The Hague, to be installed in the Peace Palace, and the services which it may render to international law, are too important to be adequately discussed within the narrow compass of an editorial comment. With full knowledge of this fact and reserving the subject for a special article in a future issue of the JOURNAL, it seems advisable to state in general the reasons which, in the eyes of the founders of the Academy, justify its creation, and to enumerate some of the advantages which are expected to result from its successful operation. The proposition to establish an Academy of International Law at The Hague was first officially made, it is believed, by Mr. Demetrius Sturdsa, Prime Minister of Roumania at the time of the Second Peace Conference in 1907, a proposition based apparently upon two articles in the *Deutsche Revue* for April, 1907, written respectively by the distinguished publicist, Professor Otfried Nippold, and Mr. Richard Fleischer, editor of the *Revue*. The president of the Conference, the late Mr. Nelidow, referred approvingly to the articles in the session of the Conference of July 20, 1907, and at a later session, on September 7, 1907, he laid before it a letter addressed to him by Mr. Sturdsa advocating the creation of an Academy of International Law and containing a draft project for its establishment. In view of the importance of Mr. Sturdsa's action and in view also of the creation of an institution differing in some important details from his proposal, yet nevertheless based upon it, it seems advisable to quote what may be considered the material portion of Mr. Sturdsa's letter:

The Peace Conference pursues a great object, that of bringing about the pacific settlement of international disputes.

To this end, in 1899, a permanent international court of arbitration was established, for the purpose of adjudging the disputes which would be submitted to it. The Conference now seeks to give to arbitral justice a still greater development. This would be the time, then, to create between the international tribunal and the Conference a bond which cannot be other than scientific, in order that practice and theory may march hand in hand and mutually aid each other. There should be established, therefore, at The Hague a fully developed institute of international law, the direction of which would be entrusted to the Peace Conference, the practical execution to the permanent administrative council established in 1899, and the scientific development to an academy of international law, which would, in a methodical way, maintain the science on a level with the principles enunciated by the Conference, and practice on a level with the progress inaugurated.

No action was taken by the Conference on the letter or project except to thank Mr. Sturdsa for his initiative and to deposit his project among the archives of the Conference. An examination of Mr. Sturdsa's letter and of the project which accompanied it shows that the institution he advocated was to be scientific in nature and to provide instruction in the various branches of international law by eminent scholars, professors, and jurists of different countries, in order, as he said, "that practice and theory may march hand in hand and mutually aid each other"; that the academy was to be an official body, inasmuch as it was to be created by the Conference and that it was to be run by the Administrative Council of the Permanent Court of The Hague. The academy which he proposed was to be, as it were, an emanation of the Conference, directed by an official international body; its expenses were to be borne by the states taking part in its creation and operation; and its student body was to be formed by the designation on the part of the states of "diplomats, army officers, persons serving in the higher executive departments of the state, and scholars."

Without entering into further details, it is sufficient to say that objections were made to an academy of this nature, as it was feared that its courses of instruction would but reflect the views of the states participating in its organization and operation, and that the scientific instruction would necessarily be colored by the desires and special interests of states considered as such. It was recognized, however, that the nations at large should take an interest in such an academy to the extent of designating students to attend its courses, but that it should be a scientific institution, the expenses of which should be met not by the states themselves but from private sources.

Leaving out of consideration certain projects for universities at The Hague which were made from time to time, requiring a large capital and the expenditure of a princely income and which were, it is believed, calculated rather to retard than to promote the establishment of the proposed institution, a committee of Dutch publicists, under the presidency of the late T. M. C. Asser, was formed at The Hague to bring the matter to the attention of the Carnegie Endowment for International Peace, which had recently been established, and to urge it to assure financial backing to a more modest institution. As a result of negotiations extending over a period of two years and more between Mr. Asser, on the one hand, representing the Dutch committee, and Mr. Scott, on the other hand, representing the Carnegie Endowment, an agreement was reached by which the Carnegie Endowment pledged its financial support to the institution, in order to secure its establishment and to secure a fair trial of what must be called an international experiment. On January 12, 1914, a joint session was held at The Hague of a sub-committee of the Dutch publicists and of the Consultative Committee of the Institute of International Law, which acts as adviser to the Endowment in matters of international law, which Mr. Scott attended as representative of the Carnegie Endowment. At this meeting a constitution—technically called statutes—of the proposed academy was approved and accepted on the part of the Endowment; the academy itself was founded in compliance with the terms of Dutch law on January 26, 1914; and a meeting of the curatorium, that is to say, the Board of Trustees, of the Academy was held at Paris January 30–31, which drafted its by-laws, technically called *règlement*.

It will be observed that the statutes of the Academy practically give effect to Mr. Sturdsa's proposal, changing it, however, into an institution founded by private initiative, controlled by unofficial trustees of different nationalities, so that the direction is international and not official, to be supported by funds from private as distinct from official sources, although the governments are, it is hoped, to be interested in the academy and its operation by appointing to attend its sessions active or former officials of the diplomatic, consular, army and navy services. It is believed that in this way the nations will benefit by the establishment of the Academy without the disadvantages which might result from their control of it.

The relations which the new institution will sustain to the Conference are similar to, if not identical with, Mr. Sturdsa's proposal. In his letter

from which a quotation has already been made he referred to an institution which was to be created "between the international tribunal and the Conference," resulting in "a bond which cannot be other than scientific, in order that practice and theory may march hand in hand and mutually aid each other," and in the preamble to his project he called attention to "the necessity of developing in a systematic manner international law and its practical application to international relations." This was to be attained by courses on the various branches of international law "such as private international law, the law of war, comparative commercial law, commercial systems and economic relations, colonial systems, the history of international law," to be given by "the most eminent scholars, university professors, and jurists of all countries." Articles 2 and 3 of the statutes appear to realize Mr. Sturdsa's conditions:

> The Academy is a center of advanced studies in international law (public and private) and related sciences, for the purpose of facilitating a profound and impartial study of questions bearing upon international legal relations. (Article 2.)
>
> To this end, the most competent men of the different states are called upon to teach, by means of courses, lectures or seminars, the most important subjects relating to international theory, practice, legislation and jurisprudence, particularly as resulting from the action of conferences and from international awards. (Article 3.)

Without attempting at this time and in this place to interpret these articles, it is sufficient to say that no international institution of this kind exists. It is the belief of its founders, which experience will, it is hoped, justify, that any one wishing to take advanced work in international law, especially as it results from the action of international conferences—more especially the Hague Conferences, and international awards—more especially the awards of the Hague Tribunal—will turn his steps to The Hague, which is becoming, if it has not actually become, the center of international development.

It will be noted that the professors or lecturers are to be drawn from different countries, so that in this respect the Academy is unique, as national views will be thrown into the international melting pot, so to speak. The courses of instruction are to be held during the summer months, when European institutions are not in session, so that the Academy does not compete with other institutions of a more or less similar character. The student body will, it is hoped, be made up of students coming from different countries, including therein competent persons to be designated by the nations, so that in this respect the Acad-

emy is likewise unique, as the bulk of its students will be drawn, not from one nation, but from many nations.

In order to place beyond question the international character of the institution, the Curatorium or Board of Trustees is to be composed of twelve members, no two of whom shall come from one and the same country, and the scientific standing of the Academy and the Curatorium is guaranteed by the fact that "the president and the ex-presidents of the Institute of International Law at the time of the founding of the Academy" are *ex officio* members of the Curatorium, thus placing it, as it were, under the auspices of the Institute of International Law, which is universally regarded as the most competent body of international lawyers in the world. As a matter of fact, eleven of the twelve members of the Curatorium are members or associates of the Institute of International Law, and the Curatorium, thus composed, "draws up the year's program and appoints the persons to give instruction" (Article 6, section 6). It thus appears that the Academy is international in fact as well as in theory; that it is established in the very center of international development; that its faculty, changing from year to year, and its student body are to be drawn from different countries; that its student body will be composed at least in part of officials and of private students from different countries; and that the international character is adequately safeguarded by the Curatorium or Board of Trustees, composed of members of the Institute of International Law likewise of different nationalities.

The importance of the Academy and its close and intimate relations with the Institute of International Law are thus stated in a recent circular issued by the Secretary General of the Institute, who is also the Secretary General of the Academy:

> It is my duty to announce * * * the founding of the Hague Academy of International Law and I cannot refrain from giving you certain details in connection with this important event.
>
> You will recall that, on the occasion of our last meeting at Oxford, the Institute of International Law, consulted by Mr. James Brown Scott, our colleague, Secretary of the Carnegie Endowment of International Peace at Washington and Director of the Division of International Law of the said Endowment, recommended "the establishment at The Hague of a center of advanced studies in international law and related sciences, for the purpose of facilitating a profound and impartial study of questions bearing upon international legal relations."
>
> That is exactly what has been created at The Hague under the name of Academy, although this term does not entirely convey, in French, the nature and object of this new organization.

A charter (*acte de fondation*) regularly drawn up before a notary at The Hague, thanks to the heirs of Mr. Asser and a philanthropist of this city who put up a capital of thirty thousand florins, sufficed to give this institution, according to Dutch law, a civil status and existence of its own, independent of its founders. The management of the scientific work of this Academy is, according to its statutes, entrusted to a Curatorium consisting of twelve members, and its business management to an Administrative Council assisted by a Finance Committee. * * *

The capital put up for this Academy, thanks to the liberality of the Dutch donors, would indeed be insufficient to insure its existence. Thanks to the boundless generosity of Mr. Carnegie and the support of the organization which he founded at Washington, the Carnegie Endowment for International Peace, it can live and prosper. Without the Carnegie Endowment, which has promised the new Academy a subvention of forty thousand dollars, the idea initiated by the genius of Mr. Sturdsa, taken up again by Mr. Asser, encouraged by the Trustees of the Carnegie Endowment and by the Institute itself, would have remained in the dream state.

The statutes * * * were drawn up with the advice of and after consideration by your Consultative Committee for the Carnegie Endowment, which was called by its President at the request of Mr. Scott, in order to lay before it draft statutes drawn up by Mr. Asser and Mr. Scott himself. The meeting of this Committee took place at The Hague on Saturday, January 12, 1914, and the days following. There were present Messrs. Gram, Hagerup, Fusinato, Renault, Scott, Vesnitch and your Secretary General acting as President.

As a result of this meeting and of the charter which was passed a few days after, the Curatorium was completed at a session which took place at Paris January 31 and the days following, and is at present composed (I deem it my duty to give you these details, although it is independent of the Institute) of the following members:

1. Mr. Renault, President
2. Mr. Harburger
3. Baron Descamps
4. Mr. Goos
5. Mr. Hagerup
6. Mr. Lardy
7. Lord Reay
8. Mr. James Brown Scott

} members *ex officio*.

9. Mr. Heemskerk, selected by the Council.

10. Mr. Alvarez
11. Mr. Fusinato
12. Mr. de Taube

} elected by the Curatorium.

As you will see by an examination of the statutes, the advanced instruction in international law in the Academy cannot compete with the instruction given in universities, not only because it will be more profound and more specialized, but because it will be given during the usual period of university vacations.

No statement is made at this time of the proposed courses of instruction, as this is a matter for the deliberations of the Curatorium, which is actually occupied with this difficult and delicate task. The Academy

will be formally opened in September of this year, although instruction will not begin until a year later. It is expected that at the next meeting of the Curatorium in September, the program for the year 1915 will be drawn up and announced at the formal opening, so that prospective students will have ample time in order to make their arrangements. The statutes giving the details of organization and the terms of admission are annexed as an appendix to this brief comment.

STATUTES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, ESTABLISHED IN CO-OPERATION WITH THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

ARTICLE 1

1. An Academy of International Law is established at The Hague.
2. It is located in the Peace Palace.

ARTICLE 2

The Academy is a center of advanced studies in international law (public and private) and related sciences, for the purpose of facilitating a profound and impartial study of questions bearing upon international legal relations.

ARTICLE 3

1. To this end, the most competent men of the different states are called upon to teach, by means of courses, lectures or seminars, the most important subjects relating to international theory, practice, legislation and jurisprudence, particularly as resulting from the action of conferences and from international awards.
2. Instruction is given during the months of July to October.
3. The scale of remuneration of those giving instruction is determined by the Curatorium, within the limits of the budget as fixed by the Administrative Council.

ARTICLE 4

The members of the Board of Directors of the Carnegie Foundation for the Peace Palace constitute the Administrative Council of the Academy.

ARTICLE 5

1. A Curatorium composed of twelve members has charge of the scientific work of the Academy.
2. The Curatorium is composed of (1) the President and the ex-Presidents of the Institute of International Law at the time of the founding of the Academy, who may accept; (2) the Director of the Division of International Law of the Carnegie Endowment for International Peace; (3) a Dutch member, appointed by the Administrative Council mentioned in Article 4. The foregoing members appoint the other members of the Curatorium necessary to bring the number up to twelve.
3. With the exception of the Director of the Division of International Law of the

Carnegie Endowment for International Peace and of the Dutch member above referred to, who are members by right, the Curatorium shall make the necessary appointments by co-optation to fill the vacancies that may occur, it being understood that the Curatorium shall never include at one and the same time two citizens or subjects of any one state.

4. If more than one of the presidents of the Institute of International Law belong to the same state, only the one who first served as president shall be a member of the Curatorium.

ARTICLE 6

1. The Curatorium appoints its President.

2. A quorum of five members is required in order to make its acts valid.

3. Voting by mail is allowed only for the election of its president, or of a member of the Curatorium or of the Finance Committee mentioned in Article 13 below.

4. There must be a meeting of the Curatorium at least once a year. Any member of the Curatorium who is absent from three consecutive meetings shall be considered as having resigned.

5. The members of the Curatorium shall receive, for traveling and hotel expenses, an amount the basis of which is fixed by the Administrative Council.

6. The Curatorium draws up the yearly program and appoints the persons to give instruction.

7. It may, by agreement with the authors and if it is deemed advisable, provide for the publication of courses or lectures within the limits of the budget as fixed by the Administrative Council.

8. It delegates one or more of its members to be present at the Academy during the term.

ARTICLE 7

1. The Administrative Council appoints, in conjunction with the Curatorium, a Secretary General, who acts as Secretary to both these bodies. His salary is fixed by the Administrative Council.

2. The Administrative Council appoints a Treasurer and fixes his salary, if required.

ARTICLE 8

1. The Administrative Council publishes, before September 30 of each year, a report of the activities of the Academy during the preceding year.

2. This report must be sent to all the members of the Curatorium and of the Finance Committee, to the Carnegie Endowment for International Peace, and to the Institute of International Law.

ARTICLE 9

1. The Administrative Council grants admission to the courses, lectures, and seminars, and likewise may, as a disciplinary measure, withdraw the privilege thus granted.

2. Admission may not be refused to the holders of a doctor's degree from a university, to the officials or former officials of the diplomatic or consular services, to army or navy officers or former army or navy officers.

3. The Administrative Council may make admission contingent upon the payment of a fee not to exceed twelve florins.

4. "Certificates of assiduity" may be awarded.

ARTICLE 10

The Administrative Council may establish scholarships, with the consent of the Finance Committee and after having asked the advice of the Curatorium.

ARTICLE 11

1. The Administrative Council represents the Academy in its legal and other relations.

2. In order to bind the Academy or to give a legal release, the signature of at least two members of the Administrative Council and the countersignature of the Secretary General are required.

ARTICLE 12

The income of the Academy consists of:

(a) Interest and arrears on the capital of the Foundation;

(b) The annual subvention granted by the Carnegie Endowment for International Peace;

(c) Donations, legacies or other gifts from associations or individuals;

(d) Matriculation fees mentioned in Article 9, paragraph 3.

(e) Proceeds from the sale of the Academy's publications.

ARTICLE 13

1. A Finance Committee is charged with the functions enumerated in Articles 14, 15, 16.

2. This Committee is composed of three members, two of whom are appointed by the Curatorium, and the third by the Administrative Council.

ARTICLE 14

Unless authorized by the Finance Committee, the Administrative Council may not:

(a) Bring suit, compromise or acquiesce in actions brought against the Academy;

(b) Accept or refuse donations or legacies;

(c) Sell, mortgage, pledge, lease or permit the use of any real estate belonging to the Academy;

(d) Buy real estate or personal property, the price of which exceeds the sum of 1,000 florins;

(e) Contract obligations exceeding the sum of 2,500 florins;

(f) Erect buildings;

(g) Make any repairs costing more than 1,000 florins.

ARTICLE 15

1. Before October 15 of each year the Administrative Council submits to the Finance Committee a budget of receipts and disbursements for the ensuing year.

2. The Finance Committee fixes the budget, with or without modifications, at a meeting held during the month of December.

3. The members of the Administrative Council may attend this meeting in an advisory capacity.

4. The Administrative Council may not exceed the amounts of the items in the budget of disbursements without the authorization of the Finance Committee.

ARTICLE 16

1. Before April 1 of each year the Administrative Council submits to the Finance Committee an account of the receipts and disbursements of the preceding year.

2. The Finance Committee, after verifying it, passes the account, with or without modifications, at a meeting held in the month of May.

3. The members of the Administrative Council may attend this meeting in an advisory capacity.

ARTICLE 17

Except as otherwise provided in the foregoing articles, the Administrative Council has full authority for the proper management of the Academy.

ARTICLE 18

1. If four at least of the seventeen members composing the Curatorium and the Administrative Council shall deem an amendment to the present statutes necessary or desirable, they shall notify the Administrative Council of their desire, and the latter shall, in its annual report, make known the modification requested.

2. Upon the expiration of at least six months the Administrative Council, the Curatorium, and the Finance Committee, in a joint meeting presided over by the senior of the three Presidents, passes upon the proposal, with or without amendments, by a majority of votes.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Vie Int.*, La Vie Internationale, Brussels; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletin, bulletin, bolletino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletin de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain, Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L'Int. Sc.*, L'Internationalism Scientifique, The Hague; *Mém. dipl.*, Memorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *Martens*, Nouveau recueil générale de traités, Leipzig; *Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

May, 1912.

20 NETHERLANDS—NORWAY. Treaty of commerce and navigation signed. French text: *Arch. dipl., 129*:12.

September, 1912.

25 ITALY—JAPAN. Treaty of commerce and navigation signed. French text: *Arch. dipl., 129*:18.

January, 1913.

10 FRANCE—NETHERLANDS. The protocol concerning maritime navigation signed Dec. 19, 1909, was ratified by notes containing further agreements on the subject. French text: *Martens (3), 7*:770.

12 BELGIUM—BOLIVIA. Belgian decree promulgating consular convention signed Aug. 21, 1909. French text: *Mém. dipl., 51*:631.

February, 1913.

18 BELGIUM—GERMANY. Exchange of notes concerning customs tariff. German and French texts: *Reichs G., 1913*:743.

February, 1913.

28 GERMANY—RUSSIA. Convention signed relating to literary and artistic property. French text: *Arch. dipl., 129*:5.

March, 1913.

15 DENMARK—SIAM. Treaty concerning extraterritorial jurisdiction signed. Ratifications exchanged June 12, 1913. French text: *Martens (3), 7*:674.

April, 1913.

3 NETHERLANDS—PORTUGAL. Convention signed submitting the delimitation of possessions in Timor to the arbitration of the President of Switzerland. English text: *Peace movement, 2*:489; German text: *Friedens Bewegung, 2*:506; French text: *Mouvement pacifiste, 2*:483 and *Martens (3), 7*:656.

May, 1913.

16 GREAT BRITAIN—NORWAY. Convention signed relating to the application of the treaty of March 18, 1826 to certain possessions of Great Britain. French and Norwegian texts: *Arch. dipl., 129*: 34.

29 CHINA—JAPAN. Arrangement signed relating to a reduction of the customs on merchandise on the frontier railway between Corea and Manchuria. *Martens (3), 7*:653.

June, 1913.

10 ROUMANIA—SERVIA. Treaty signed. Text: *Pesti Hirlap* (Roumania), Jan. 7, 1914; *Mém. dipl., 52*:18.

13 MEXICO—NETHERLANDS. Netherlands recognized the Huerta government in Mexico. *B. Rel. Ext.* (Mexico), *36*:230.

15 MEXICO—URUGUAY. Uruguay recognized the Huerta government in Mexico. *B. Rel. Ext.* (Mexico), *36*:228.

16 MEXICO—MONACO. Monaco recognized the Huerta government in Mexico. *B. Rel. Ext.* (Mexico), *36*:229.

17 DENMARK—SWEDEN. Extradition treaty signed. Ratifications exchanged June 21, 1913. Danish and Swedish texts: *Martens (3), 7*:677.

20 BULGARIA—MEXICO. Bulgaria recognized the Huerta government in Mexico. *B. Rel. Ext.* (Mexico), *37*:11.

July, 1913.

1 BULGARIA—GERMANY. German proclamation announcing exchange of ratifications of the consular, legal procedure and extradition treaties signed Sept. 29, 1911. German and Bulgarian texts: *Reichs. G., 1913*:435.

5 BELGIUM—PORTUGAL. Protocol signed relating to the frontiers between Congo Free State and Portuguese colonies. French text: *Mém. dipl., 51*:647.

14 COSTA RICA—MEXICO. Costa Rica recognized the Huerta government in Mexico. *B. Rel. Ext.* (Mexico), *36*:227.

15 GREAT BRITAIN—PARAGUAY. Accord signed relative to the application of the extradition convention of Sept. 12, 1908, to certain British possessions. English and French texts: *Arch. dipl., 129*: 37.

21 BELGIUM—NETHERLANDS. Exchange of notes relating to the repatriation of minors of the two countries. French and Dutch texts: *Monit., 1914*:244.

29 PERMANENT COURT OF ARBITRATION AT THE HAGUE. Guatemala appointed to the Hague Court, Señor Antonio Gonzàlez Sarabia, doctor of law and member of the Supreme Court of Guatemala, and Señor Alberto Mencos, doctor of law and former minister to Salvador and Spain, in place of Señor Francisco Anguiana and Señor Francisco de Acre. *B. Rel. Ext.* (Mexico), *37*:101.

August, 1913.

8 PERMANENT COURT OF ARBITRATION AT THE HAGUE. Panama appointed to the Hague Court, Señor Ramón Valdes, doctor of law, former Secretary of State, of Justice and Government, former envoy extraordinary and minister plenipotentiary to the United States and Minister resident in London and Brussels, in place of the late F. Mutis Doran. *B. Rel. Ext.* (Mexico), *37*:102.

9 PORTUGAL—MEXICO. Portugal has recognized the Huerta government in Mexico. *B. Rel. Ext.* (Mexico), *37*:12.

14 MEXICO—TURKEY. Turkey has recognized the Huerta government in Mexico. *B. Rel. Ext.* (Mexico), *36*:322.

14 BOLIVIA—MEXICO. Bolivia has recognized the Huerta government in Mexico. *B. Rel. Ext.* (Mexico), *37*:78.

September, 1913.

17 BELGIUM—NETHERLANDS. Dutch decree carrying into effect the treaty signed July 21, 1913, relative to minors of each country in the territory of the other country. French and Dutch texts: *Staatsb., 1913*, No. 371.

19 NETHERLANDS—SWEDEN. Dutch decree carrying into effect the treaty signed May 2, 1913, relating to sailors of either country in the territory of the other country. French and Dutch texts: *Staatsb., 1913*, No. 372.

October, 1913.

13 JAPAN—NETHERLANDS. Dutch decree carrying into effect the treaty of commerce and navigation signed July 6, 1912, ratifications of which were exchanged at Tokio, Oct. 8, 1913. At the time of the exchange of ratifications an additional protocol was signed excepting Dutch colonies and possessions from the operation of Articles 3, 4, 14 and 15, and providing that the matters therein regulated should be regulated according to the consular convention between the two countries, signed April 27, 1908. On March 2, 1912, previous to the signing of the treaty of commerce and navigation, Japan, by a note verbale, agreed to accord most-favored-nation treatment to Netherlands. French and Dutch texts of treaty, French and Dutch texts of protocol, and French and English texts of note verbale: *Staatsb., 1913*, No. 389.

14 PERMANENT COURT OF ARBITRATION AT THE HAGUE. Denmark appointed to the Hague Court, Mr. D. Nyholm in place of Mr. P. J. Jörgensen. Mr. Nyholm is state counsellor, member of the Mixed Courts of Egypt and ex-Assessor of the Superior Court of Copenhagen. *B. Rel. Ext.* (Mexico), *37*:28.

14 FRANCE—TURKEY. Accord signed relating to claims, concessions, etc., French text: *Q. dipl., 36*:555.

23 PERMANENT COURT OF ARBITRATION AT THE HAGUE. Uruguay appointed to Hague Court, Señor Dr. Juan P. Castro. *B. Rel. Ext.* (Mexico), *37*:103.

23 FRANCE. Decree regulating the passage of air ships over certain zones. French text: *R. gén. de dr. int. pub. 20* (*doc.*): 67; *J. O., 1913*:8871, 9415, 9447.

October, 1913.

29 GERMANY—NETHERLANDS. Dutch decree carrying into effect the treaty, signed July 28, 1913, which extended to the Germany colony of Kiao-chou, the terms of the extradition treaty between the two governments, signed Sept. 21, 1897. Dutch and German texts: *Staatsb., 1913*, No. 401.

November, 1913.

22 FRANCE—GREAT BRITAIN. Parcel post agreement signed. French and English texts: *G. B. Treaty series*, No. 2, 1914.

25 GERMANY—SPAIN. By exchange of notes the two governments agreed to continue in force the agreement between France, Germany, Spain, England, Congo Free State and Portugal, relating to the importation of arms into occidental Africa, signed July 22, 1908, and denounced by France, Feb. 15, 1913. Spanish texts of notes: *Ga. de Madrid, 1914, 1*:138.

December, 1913.

12 ABYSSINIA. Death of King Menelik of Abyssinia announced.

20 HONDURAS—MEXICO. Mexican decree carrying into effect the parcel post convention signed March 24, 1908, ratifications of which were exchanged Dec. 17, 1913. Spanish text: *B. Rel. Ext.* (Mexico), *37*:80.

22 BELGIUM—FRANCE. Agreement signed relating to the pasturage of cattle on the frontiers. French and Flemish texts: *Monit., 1913*:8765.

23 FRANCE—ITALY. By an exchange of notes arbitration convention renewed for a further period of five years. *J. O., 1914*: 314.

24 CRETE. The Powers recognized the annexation of Crete to Greece. *Mém. dipl., 51*:676.

24 ROUMANIA—SERVIA. Convention signed relating to the construction of a railway bridge across the Danube between Tziganeshti, Roumania and Brzapalanka, Servia. *Mém. dipl., 51*:675.

24 GREECE—ROUMANIA. Postal convention signed. *Mém. dipl., 51*: 675.

00 GREECE—NETHERLANDS. A convention signed submitting to arbitration certain questions relating to the status of foreigners in the Levant. *Mouvement pacifiste, 2*:485, *Peace movement, 2*:489.

January, 1914.

13 MEXICO. The government suspended for six months the payment of interest on the national debt. The Mexican Minister of Finance, Adolfo de la Lama, resigned as a protest against the repudiation.

16 MEXICO. France, Germany and Great Britain formally protested against the action of Mexico in suspending for six months the interest on the national debt. *R. pol. et parl., 79*:423.

20 BULGARIA—SERVIA. General Holmsen, arbiter in the arbitration of frontier question, rendered his sentence. *Q. dipl., 27*:178.

20 International Congress on Safety at Sea which met in London November 14, 1913, held its last meeting, at which a convention was signed by the following Powers: Germany, Austria, Belgium, Denmark, France, Great Britain, Italy, Netherlands, Norway, Russia, Spain, Sweden and the U. S. Japan sent a delegation to the Conference late in the session, but did not authorize it to vote or sign a convention. The treaty permitted other nations to sign up to Jan. 31, 1914. Ratifications must be deposited not later than Dec. 31, 1914 and the Convention comes into force July 1, 1915. It has no limit as to time of existence, but may be denounced after five years. English text, Senate Ex. doc. B. 63d Cong. 2d. sess.

BOLIVIA—UNITED STATES. Treaty signed following the peace plan of the Secretary of State of the United States. See: *this Journal, 7*:833.

24 PARAGUAY—UNITED STATES. Proclamation by the United States of the extradition treaty signed March 26, 1913, ratifications of which were exchanged at Asuncion, January 14, 1914. English and Spanish texts: *U. S. Treaty series*, No. 584.

27 HAITI—UNITED STATES. The President of Haiti, Michel Oreste, fled from Port-au-Prince and took refuge on the German cruiser *Vineta*. Detachments of blue jackets were landed from the *Vineta* and from the United States armored crusier *Montana*. *Washington Post*, Jan. 28, 1914.

29 THE ACADEMY OF INTERNATIONAL LAW was founded at The Hague. The sessions are to be held in the Peace Palace at The Hague and will be inaugurated in August, 1914. The directors are Albéric Rolin, Francis Hagerup, N. Vesnitch and M. Harburger. A. P. C. Van Karnebeck is President of the Executive Committee.

January, 1914.

The funds for the Academy were contributed by the late T. M. C. Asser out of the Nobel Peace Prize awarded him in 1911, and by a subvention from the Carnegie Endowment for International Peace.

31 GREAT BRITAIN—ITALY. Exchange of notes renewing for a further period of five years the arbitration agreement signed Feb. 1, 1904. Italian and English texts: *G. B., Treaty series*, No. 4, 1914.

February, 1914.

2 MEXICO—UNITED STATES. The President of the United States issued an Executive Order revoking the proclamation of President Taft, dated March 14, 1912, forbidding the shipment of arms and munitions of war into Mexico. The Joint Resolution of Congress authorizing the Proclamation made it unlawful to export arms into Mexico, except under such conditions as the President of the United States should prescribe. Under this power the Washington Government permitted the shipment of arms into Mexico by the regularly constituted Government of Mexico, and under the same power the President could remove the embargo on the shipment of arms to the revolutionary forces by revoking the Proclamation. Text of Joint Resolution, Proclamation, and Executive Order: *Washington Post*, Feb. 3, 1914. The following governments have recognized the Huerta Government: Austria-Hungary, Belgium, Bolivia, Bulgaria, China, Colombia, Costa Rica, Denmark, Ecuador, France, Germany, Great Britain, Guatemala, Haiti, Honduras, Italy, Japan, Montenegro, Monaco, Norway, Netherlands, Peru, Portugal, Russia, Salvador, Spain, Switzerland, Turkey and Uruguay.

4 PERSIA—UNITED STATES. Arbitration treaty signed following the lines of the peace plan of the Secretary of State of the United States. See: *this Journal, 7*:823

4 PORTUGAL—UNITED STATES. Treaty signed following the peace plan of the Secretary of State of the United States. See: *this Journal, 7*:823.

5 DENMARK—UNITED STATES. Treaty signed following the lines of the peace plan of the Secretary of State of the United States approved by both Houses of the Danish Parliament, Feb. 5, and ratified by the king, March 7, 1914. This treaty provides

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for the arbitration of all disputes including controversies involving matters of vital interests and national honor. Under it the United States would be bound to submit to arbitration the question of the sale of the Danish West Indies to an European Power, in contravention of the Monroe Doctrine. The Danish West Indies, St. Thomas, St. John and St. Croix, lie at the Northern extremity of the Lesser Antilles, their nearest point being about 38 miles from Porto Rico. They have an area of 138 square miles and a population of about 40,000, mostly negroes. St. Thomas came into Danish possession in 1671 and St. John in 1684 and except for a short time in 1801 and from 1807 to 1815, when they were occupied as a war measure, have remained under Danish rule. Santa Cruz was purchased by the King of Denmark in 1753 for 750,000 French livres. In 1758 the Danish crown paid $1,418,000 to the Danish West India Company and the Islands have since been Crown property. They are of no profit to Denmark and at various times the United States has entered into negotiations for their purchase.

In 1866 Mr. Seward, then Secretary of State offered $5,000,000 for them. This offer was refused, but a convention was finally signed Oct. 24, 1867 by which the United States agreed to pay $7,500,000 for St. Thomas and St. John, and allow the inhabitants to vote upon the question of the ratification of the treaty. The inhabitants voted to ratify the treaty, which was done by the Rigsdag, the King signing on Jan. 31, 1868. The treaty was reported adversely to the United States Senate in the Session of 1868. In 1892 and again in 1896, Denmark being approached by the United States expressed willingness to revive the treaty of 1867. The strategic value of the Islands to the United States is less since the accession of Porto Rico. *Reports of the Committee on Foreign Relations, U. S. Senate, 1789–1901, Vols. 7 and 8, N. Y. Times,* Feb. 28, 1914. See: *this Journal, 7*:823.

10 CHINA. A contract was signed between China and the Standard Oil Company granting to the Company a concession for 60 years for developing the oil fields of Shensi and Chihli. The Chinese government is to receive 37½ per cent of the shares of the new company as the price of the concession, with the right to take up an additional 7½ per cent within two years. No Chinese

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shares may be sold to foreigners, and no exclusive oil rights are to be granted to other foreigners elsewhere in China for a year from the date of the contract. On March 12, Japan formally protested to China that the concession was a violation of the treaty rights of Japan. China refused to modify the concession. *Times*, Mch. 23, 1914.

12 JAPAN. The Japanese House of Representatives passed a budget providing an appropriation of $62,000,000, spread over five years, for the expansion of the navy. *Washington Post*, Feb. 13, 1914.

12 FRANCE—PERU. French decree carrying into effect the protocol signed Feb. 2, 1914, providing for the arbitration of mutual claims by the Hague Court. French text: *J. O., 1914*:1359.

12 PERU—UNITED STATES. The Secretary of State of the United States directed the United States Minister to Peru to recognize the new provisional government of Peru, on behalf of the United States. On Feb. 3 the President of Peru was deposed and exiled, and a governing junta, composed of representatives of all political parties took charge of the government pending an election. The situation in Peru is not regarded as similar to that of Haiti and Mexico.

13 SWITZERLAND—UNITED STATES. Treaty signed following the peace plan of the Secretary of State of the United States. See: *this Journal*, 7:823.

13 COSTA RICA—UNITED STATES. Treaty signed following the peace plan of the Secretary of State of the United States. See: *this Journal*, 7:823.

14 DOMINICAN REPUBLIC—UNITED STATES. Treaty signed following in general the peace plan of the Secretary of State of the United States. It differs from the other treaties negotiated in that Articles I and II are identical with Articles I and II of the Root arbitration treaties of 1908, and Article III, which corresponds to Article I of the peace plan treaty differs from that Article by specially mentioning the Hague Permanent Court of Arbitration as a means for settling differences and by referring to the international commission to be created as a "permanent" commission. Article V, which corresponds to Article III of the peace plan treaty, differs only in language from that article. Article IV of the peace plan, which binds the contracting parties not to in-

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crease their military or naval programmes unless menaced by a third Power, etc., is omitted in the Dominican treaty.

15 GREAT BRITAIN—SPAIN. Exchange of notes renewing for a further period of five years the arbitration agreement signed Feb. 27, 1904. Spanish and English texts: *G. B., Treaty series*, No. 3, 1914.

15 FRANCE—GERMANY. Agreements initialled relating to railway interests in Asia Minor. *Times*, Feb. 16, 1914.

18 PANAMA—PERU. Panama recognized the new Peruvian Government. *Herald*, Feb. 19, 1914.

26 FRANCE—SPAIN. Exchange of notes renewing for a further period of five years the arbitration convention which was signed Feb. 26, 1904, and renewed for five years on Feb. 26, 1909. *Ga. de Madrid*, 1914—Tomo *1*:475.

21 GREAT BRITAIN—UNITED STATES. The U. S. Senate advised and consented to the ratification of the arbitration treaty, renewing the treaty which expired June 4, 1913.

21 ITALY—UNITED STATES. The U. S. Senate advised and consented to the ratification of the arbitration treaty, renewing the treaty which expired Jan. 22, 1914.

21 NORWAY—UNITED STATES. The U. S. Senate advised and consented to the ratification of the arbitration treaty, renewing the treaty which expired June 24, 1913.

21 JAPAN—UNITED STATES. The U. S. Senate advised and consented to the ratification of the arbitration treaty, renewing the treaty which expired Aug. 24, 1913.

21 PORTUGAL—UNITED STATES. The U. S. Senate advised and consented to the ratification of the arbitration treaty, renewing the treaty which expired Nov. 14, 1913.

21 SPAIN—UNITED STATES. The U. S. Senate advised and consented to the ratification of the arbitration treaty, renewing the treaty which expired June 2, 1913.

21 SWITZERLAND—UNITED STATES. The U. S. Senate advised and consented to the ratification of the arbitration treaty, renewing the treaty which expired Dec. 23, 1913.

March, 1914.

2 PARAGUAY—UNITED STATES. Treaty signed following the peace plan of the Secretary of State of the United States. The follow-

ing countries have signed similar treaties: Salvador, Honduras, Paraguay, Guatemala, Panama, Nicaragua, Netherlands, Portugal, Persia, Bolivia, Denmark, Switzerland, and Costa Rica. See: *this Journal, 7*:823.

5 CHINA—GREAT BRITAIN. The British Chinese Corporation has been granted the right to construct 500 miles of railway from Nanking to Nanchange and Changsha. *Herald*, March 6, 1914.

5 CHINA—FRANCE. The Sino-French Banque Industrielle has been granted the construction of the Peking tramways. *Herald*, March 6, 1914.

6 SWEDEN—UNITED STATES. Agreement extending the duration of the arbitration convention of May 2, 1908. Signed, June 28, 1913; ratified by Sweden August 29, 1913; ratification advised by the Senate February 21, 1914; ratifications exchanged March 6, 1914; proclaimed by the United States, March 6, 1914. English and French texts: *U. S., Treaty series*, No. 585.

9 GREAT BRITAIN—UNITED STATES. The third sitting of the Tribunal constituted under the treaty of Aug. 10, 1910, for the settlement of all outstanding pecuniary claims between the two countries was begun March 9, in the Carnegie Institution, Washington, D. C. The Tribunal will sit until May 2, and the following cases will be heard:

The Newclewang, The Wanderer, The Favorite, The Kate, Thomas F. Bayard, Jessie, Pescawha, The Coquitlan, Lord Nelson, Gadenhead, Great Northwestern Telegraph Company, Frederick Gerring, Jr., The Argonaut, The Col. Jonas H. French, David J. Adams, Tattler, Cuba Submarine Cable Company, Eastern Extension Cable Company, Home Missionary Society, Adolf G. Studer, Hemming, Sedra and William Webster.

15 SERVIA–TURKEY. Treaty signed concerning status of Moslems, etc., in ceded territories. Servia undertakes to protect Moslem cemeteries, to protect specially the shrine of Sultan Murad the Victorious and to make no distinction between Moslems and Christians in the territories ceded. Finally Servia has agreed to allow former Ottoman subjects three years in which to opt whether they will adopt Servian nationality. In a letter appended to the treaty the Porte agrees to grant Servian residents

March, 1914.

of Turkey every facility possible to opt Servian nationality during the same time. *Times*, March 16, 1914.

17 FIFTH PAN AMERICAN CONFERENCE. Announcement made that the Fifth Pan American Conference which was to have been held in September in Santiago de Chile, would not meet before the end of November. *N. Y. Herald*, March 18, 1914.

18 CHINA. It was announced that Mr. W. W. Rockhill, recently American Ambassador to Turkey had accepted the position of Foreign Adviser of China. His duties will be to represent China abroad. *N. Y. Herald*, March 18, 1914; this *Journal*, *7*:833.

21 UNITED STATES—VENEZUELA. Treaty signed following the lines of the Peace Plan of the Secretary of State. It omits the agreement as to the status quo of armaments. *Washington Post*, March 24, 1914; this *Journal*, *7*:833.

25 COSTA RICA—UNITED STATES. The United States Senate advised and consented to the ratification of the arbitration treaty signed Jan. 13, 1909, renewing for a further period of five years the arbitration treaty which expired.

INTERNATIONAL CONVENTIONS

ADHESIONS, RATIFICATIONS AND DENUNCIATIONS

AUTOMOBILES. Paris, October 11, 1909.

Adhesion:

Great Britain for Jersey and Guernsey. Jan. 8, 1914. *Monit.*, Jan. 30, 1914.

CIVIL PROCEDURE. The Hague, July 17, 1905.

Adhesions:

Denmark (R) for Danish Antilles. Jan. 17, 1913.
Spain, March 7, 1913.
Roumania, March 30, 1913.
Russia, April 19, 1913.

French text: *Martens (3)*, *7*:243, 912.

COLLISIONS AND SALVAGE AT SEA. Brussels, September 23, 1910.

Adhesions:

Brazil, Dec. 31, 1913. *Monit., Jan. 14, 1914; J. O.*, Jan. 29, 1914.

Greece, Nov. 22, 1913. *R. gén. de dr. int. pub., 20*:752.
Japan, Jan. 14, 1914. *Monit., 1914*:637; *J. O., 1914*:1114.
Norway, Nov. 5, 1913. *R. gén. de dr. int. pub., 20*:752.
Sweden, Nov. 5, 1913. *R. gén. de dr. int. pub., 20*:752.

HAGUE CONVENTIONS. 1907.

Ratifications:

Brazil, Conventions I–XI, XIII. *J. O., 1914*:1990.
Liberia, Conventions I–XI, XIII. *J. O., 1914*:2114.

LITERARY AND ARTISTIC PROPERTY. Berne, September 9, 1886; Berlin, Nov. 8, 1908.

Adhesion:

Great Britain for Newfoundland (R), July 1, 1912, Papua and Norfolk Island, Feb. 1, 1913, Isle of Man. *R. gén. de dr. int. pub., 20*:751. French text: *J. O.*, July 28, 1912; *Reichs-G., 1913*:759; *J. O., 1914*:2290.

PECUNIARY CLAIMS. Buenos Aires, 1910.

The convention agreeing to submit all pecuniary claims to arbitration, signed January 31, 1902, at Mexico and extended by the treaty signed at Rio de Janeiro August 13, 1906, expired Dec. 31, 1912. The treaty signed at Buenos Aires, August 11, 1910, provided that the treaty should remain in force indefinitely, or, be denounced by two years' notice on the part of any of the nations. It was signed by the United States, Argentine Republic, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay and Venezuela.

The United States Senate advised and consented to the ratification of this treaty on February 15, 1911, but the ratification has not yet been made by the President.

Ratifications:

Honduras, January 15, 1914. *Ga. de Costa Rica*, Jan. 17, 1914. French, Spanish and English texts: In *Report of American Delegates to the Fourth Pan-American Conference, 1910* [*Senate Doc. 744, 61st cong., 3d sess.*]; English text: *Malloy-Charles, U. S. Treaties*, Vol. 3:345.

PRIVATE INTERNATIONAL LAW. The Hague, June 12, 1902.

Denunciations:

France denounced the Hague convention relating to marriage, guardianship and divorce, Nov. 12, 1913. *R. gén. de dr. int. pub., 20*:750.

PUBLIC HYGIENE. Rome, December 9, 1907.

Adhesions:

Argentine Republic, Bolivia, Algeria, Great Britain, with Australia, Canada and India, Italy, Mexico, Monaco, Norway, Netherlands, Peru, Persia, Portugal, Russia, Servia, Sweden, Switzerland, Tunis, Turkey and Uruguay.

RADIOTELEGRAPH. London, July 5, 1912.

Ratifications:

France. French law promulgating, Jan. 17, 1914. *J. O., 1914*: 538.

WHITE SLAVERY. Convention, May 4, 1910.

Adhesions:

Portgual.

Great Britain for Canada, Africa and New Zealand and Newfoundland. Nov. 23, 1913. *Reichs-G., 1913*:763.

KATHRYN SELLERS.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN [1]

France, Agreement between the United Kingdom and, respecting the boundary between Sierra Leone and French Guinea. London, Sept. 4, 1913 (with map). Treaty series, 1913, No. 19. 7½d.

France, Exchange of notes between the United Kingdom and, renewing for a further period of five years the arbitration agreement signed at London, October 14, 1903. Treaty series, 1913, No. 18. 1d.

Geneva Cross. Geneva Convention Act, 1911. (Newfoundland.) Stat. Rules & Orders, 1913, No. 1115. 1½d.

Immigrants Regulation Act, Correspondence relating to, and other matters affecting Asiatics in the Union of South Africa. Cd. 7111. 11d.

Prize court decisions. Russo-Japanese War, 1904–5. Vol. II—Japanese cases. 15s. 5d.

Siam, Agreement between the United Kingdom and, respecting the rendition of fugitive criminals between the State of North Borneo and Siam. Signed at Bangkok, September 18, 1913. Treaty series, 1913, No. 17. 1d.

State papers. Colonial series. Vol. XXI. America and West Indies. Dec. 1, 1702–1703. 15s. 7d.

Treaties and conventions between Great Britain and foreign Powers, and laws, decrees, orders in council, etc., concerning the same, so far as they relate to commerce and navigation, slavery, extradition, nationality, copyright, postal matters, etc., and to the privileges and interests of the subjects of the high contracting parties. (Herstlet's Commercial Treaties) Vol. XXVI. 15s. 6d. *Foreign Office.*

Treaty series, Index to. Treaty series, 1913, No. 20. 1d.

United States, Exchange of notes between the United Kingdom and, respecting the rendition of fugitive criminals between the State of North Borneo and the Philippine Islands or Guam. Washington, September 1/23, 1912. Treaty series, 1914, No. 1. 1d.

[1] Official publications of Great Britain and many of the British colonies may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

UNITED STATES [2]

Foreign sovereignties and their rulers, List of. 9th ed. Dec. 1, 1913. 1 p. *Naturalization Bureau.*

Higher nationality. Address before American Bar Association at Montreal, Canada, Sept. 1, 1913, by Richard Burdon Haldane, Lord High Chancellor of Great Britain [with introduction by Chief Justice White]. 21 p. (S. doc. 371). Paper, 5c.

Immigration. Comment with regard to H. 102 to amend act to regulate immigration of aliens into United States in regard to immigration of Asiatic laborers. Jan. 23, 1914. 6 p. (H. doc. 652.) *Labor Dept.*

Immigration, restriction of. Hearings on H. 6060, Dec. 6–12, 1913. pts. 1–3, 353 p. *Immigration and Naturalization Committee.*

———. Report amending H. 6060. Dec. 15, 1913. 8 p. (H. rp. 140.) *Immigration and Naturalization Committee.*

———. Report amending H. 6060. Dec. 16, 1913. 12 p. (H. rp. 149.) *Immigration and Naturalization Committee.*

Immigration laws, rules of Nov. 15, 1911. 2d ed. Sept. 9, 1913. 69 p. Paper, 10c. *Immigration Bureau.*

International Congress on Bills of Exchange. Report of American Delegation, with papers and proceedings of conference, held at The Hague in summer of 1912. 465 p. (S. doc. 162.) Paper, 35c.

International Joint Commission on Boundary Waters between United States and Canada. Opinion in matter of application of Michigan Northern Power Co. for approval of proposed lease with United States. Ottawa, Oct. 9, 1913. 12 p. *State Dept.*

International Radiotelegraph Convention, signed London, July 5, 1912, proclaimed July 8, 1913. Reprint of 1914, with slight changes. 31 p. il. *Navigation Bureau.*

Nobel peace prize. Letter from Counselor of State Department transmitting circular relating to, and its distribution for year 1914. Dec. 15, 1913. 2 p. (S. doc. 312.)

Opium. H. 1966, to amend act to prohibit importation and use of opium for other than medicinal purposes. Jan. 17, 1914. 3 p. Pub. No. 46. 5c.

———. H. 1967, regulating manufacture of smoking opium within United States. Jan. 17, 1914. 1 p. Pub. No. 47. 5c.

[2] When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Panama Canal. Executive order, with memorandum, to establish permanent organization of. Jan. 27, 1914. 4 p. (No. 1885.) *State Dept.*

Panama Canal. Rules for measurement of vessels. Proclamation, Nov. 21, 1913, No. 1258. 20 p. il. *State Dept.*

Seamen, American. Hearings on S. 136 to promote welfare of in merchant marine of the United States, to abolish arrest and imprisonment as penalty for desertion and to secure abrogation of treaty provisions in relation thereto, and to promote safety at sea. Dec. 13, 1913. 98 p. *Merchant Marine and Fisheries Committee.*

———. Hearings Dec. 13–19, 1913. 553 p. *Merchant Marine and Fisheries Committee.*

Uruguay, Arbitration convention between the United States and, signed Washington, Jan. 9, 1909, proclaimed Nov. 15, 1913. 5 p. (Treaty series 583). [English and Spanish.] *State Dept.*

GEO. A. FINCH.

IN RE YOUNG.

District Court, W. D. Washington, N. D.

August 15, 1912.

[198 Fed. Rep. 715.]

CUSHMAN, District Judge. The following causes are relied upon by applicant: Ludlam *v.* Ludlam, 31 Barb. (N. Y.) 486; *In re* Saito (C. C.) 62 Fed. 126; *In re* Kumagai (D. C.) 163 Fed. 922; U. S. *v.* Balsara, 180 Fed. 694, 103 C. C. A. 660; *In re* Hallajian (C. C.) 174 Fed. 834; *In re* Mudarri (C. C.) 176 Fed. 465; Bessho *v.* U. S., 178 Fed. 245, 101 C. C. A. 605; *In re* Camille (C. C.) 6 Fed. 256; *In re* Knight (D. C.) 171 Fed. 299.

This applicant for naturalization has fully complied with all of the requirements of the statutes as an alien petitioner to be admitted as a citizen of the United States, but it was heretofore decided by the judge of this court that he was not eligible for the reason that he was not a white man. By the proofs submitted, it was shown that he was born at a place in Yokohama, Japan, under the dominion of the Emperor of Germany, that he is a subject of the Emperor of Germany, and that his father is a German and his mother a Japanese woman. The court ruled that the right to become a naturalized citizen of the United States depends upon parentage and blood, and not upon nationality or status. After the making of this ruling, it was ordered that the cause be reopened for further consideration, presentation of argument and authorities, and disposition, which hearing has now been had.

In the former ruling, the court approved and adopted as its own the reasoning in the decision of *In re* Knight, 171 Fed. 299, which authority is reinforced by *In re* Ah Yup, 1 Fed. Cas. 223, No. 104, refusing the right of naturalization to a Chinaman, which case was decided prior to the Act of May 6, 1882, section 14 of which (22 Stat. at Large, 61, c. 126 [U. S. Comp. St. 1901, p. 1333]) expressly prohibits the admission of

Chinese to citizenship; Fong Yue Ting *v.* United States, 149 U. S. 698, 716, 13 Sup. Ct. 1016, 37 L. Ed. 905; *In re* Camille (C. C.) 6 Fed. 256, in which latter case the son of a white Canadian father and an Indian mother was denied the right of naturalization; *In re* Saito (C. C.) 62 Fed. 126, rejecting the application of a Japanese; *In re* Kanaka Nian, 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726, to the same effect in the case of a Hawaiian; Elk *v.* Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643.

The fact that the petitioner was born within the German legation, giving him the status of a German subject, in no way affects the question. "The power to say when and under what circumstances an alien may become a citizen belongs to Congress." *In re* Camille, *supra.* Congress has, by section 2169, R. S. (U. S. Comp. St. 1901, p. 1333), limited the rights of naturalization to those aliens being "free white persons and to aliens of African nativity and to persons of African descent."

The term "white person" must be given its common or popular meaning. As commonly understood, the expression includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as "fair whites" or "dark whites," as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin.

It is just as certain that, whether we consider the Japanese as of the Mongolian race or the Malay race, they are not included in what are commonly understood as "white persons." In the abstractions of higher mathematics, it may be plausibly said that the half of infinity is equal to the whole of infinity; but in the case of such a concrete thing as the person of a human being it cannot be said that one who is half white and half brown or yellow is a white person, as commonly understood. In Louisiana, a person was deemed white if the African blood did not exceed one-eighth. The same was true in the Colonial Code Noir of France, 2 Kent, 72, note "b." In Ohio, if there was more white blood than black or red, the person was considered white; but, if the colored blood was equal, the person was not white. Jeffries *v.* Ankeny, 11 Ohio, 372; Gray *v.* State, 4 Ohio, 354. In Virginia and Kentucky the dividing line was generally recognized as the quarter-blood. Dean *v.* Commonwealth, 45 Va. 541; Gentry *v.* McMinnis, 3 Dana (Ky.) 382; 30 Encyc. Law, 2nd Add., 517.

Courts have found it necessary in certain cases to ascribe to a child

either the status of the father or mother, as where one parent was a slave and the other free; and, treating a slave as any other animal property and following the civil law, they have held that the child took the status of the mother. In cases involving the jurisdiction of the court, as where the court had no jurisdiction to try an Indian for a crime committed against an Indian, and it was considered necessary to ascribe the defendant's status to one or the other parent, Indians being freemen, the common law has been followed, and the child has been held to take the status of the father. These decisions arose from the necessity for the adoption of an artificial rule. There is no such necessity in the case at bar. It is not necessary to determine the exact status of the petitioner. All that is necessary is to determine whether he is a "white person" within the meaning of the law.

Counsel for petitioner chiefly rely upon the case *In re* Rodriguez (D. C.) 81 Fed. 337. In that case the petitioner was a Mexican. It appears that the case was controlled by the fact that the natives of Mexico had for over 300 years been mixing their blood with that of the natives and descendants of Spain; indulging in the presumption that after that length of time the dominant race would have established itself. Further, the court was controlled by the treaty with Mexico of 1868, expressly recognizing the right of Mexicans to become naturalized citizens of the United States. This treaty had, prior to the decision, been abrogated; but, as showing the government's construction of the law limiting the right to citizenship, applied to natives of Mexico, it was considered persuasive. If this decision goes further than here indicated, it is opposed to what this court considers the weight of authority.

Petition denied.

JUDGMENT OF THE HIGH COURT OF THE EAST AFRICA PROTECTORATE IN THE CASE BROUGHT BY THE MASAI TRIBE AGAINST THE ATTORNEY-GENERAL OF THE PROTECTORATE AND OTHERS.[1]

Mombasa, May 26, 1913.

The action having been set down for argument on a preliminary point of law only on the issue of jurisdiction as raised on the pleadings by the Attorney-General, the only question that I have now to decide is whether the claims of the plaintiffs are recognizable by this court.

[1] Cd. 6939, July, 1913.

[2] Mr. Home has argued on their behalf that it is not sufficient for the government merely to plead "Act of State," but that it is incumbent on the court to scrutinize those acts which are alleged to be Acts of State so as to be able to decide whether they in fact are or are not Acts of State, and that for this purpose it will be necessary to take evidence generally; and particularly, on the point of the alleged fiduciary relationship between the Secretary of State and the Masai tribe, he wishes to put in evidence speeches in the House of Commons.

I agree that the court must satisfy itself as to the real nature of the acts which are claimed to be Acts of State, but here all the facts relied on are fully set out by the defendants in the pleadings, so that, in my view, the court is in a position to form an opinion regarding their true nature without the necessity of taking evidence generally, or considering speeches in the House of Commons, which do not create legal obligations.

Now, for the contention of the government to succeed it must be shown on the facts pleaded that the acts of which the plaintiffs complain are really such Acts of State as are not cognizable by any municipal court. These facts are shortly as follows:

In 1904 the then Commissioner of the Protectorate entered into an agreement with the Chief and certain representatives of the Masai tribe by which, *inter alia*, it was arranged that certain sections of the tribe should remove to a reserve at Laikipia. This removal took place and the tribe was consequently divided in two.

In 1911, the then Governor of the Protectorate entered into another agreement with the Chief, his regents, and certain representatives of that portion of the tribe living at Laikipia, by which it was arranged that the sections of the tribe which under the former agreement had removed to Laikipia should move south into one reserve with the remainder of the tribe.

Both of these agreements were made by the government acting on instructions from, and with the sanction of, the Secretary of State.

The Attorney-General contends that these agreements were in effect treaties while the plaintiffs prefer to call them agreements, though in their concise statement the 1904 agreement, on which they rely, is called by them a treaty. For the present I will call them agreements.

[2] Forester *v.* Secretary of State I. A., 1872, p. 10; Musgrave *v.* Pulido, 5 App. Cases, p. 102.

The material portions of these two agreements are as follows:

We, the Undersigned, being the Lybon and Chief (representatives) of the existing clans and sections of the Masai tribes in the East Africa Protectorate, having, this 9th day of August, 1904, met Sir Donald Stewart, His Majesty's Commissioner for the East Africa Protectorate, and discussed fully the question of a land settlement scheme for the Masai, have, of our own free will, decided that it is for our best interests to remove our people, flocks, and herds into definite reservations away from the railway line, and away from any land that may be thrown open to European settlement.

We have, after having already discussed the matter with Mr. Hobley at Naivasha and Mr. Ainsworth at Nairobi, given this matter every consideration, and we recognize that the government, in taking up this question, are taking into consideration our best interests.

Now, we, being fully satisfied that the proposals for our removal to definite and final reserves are for the undoubted good of our race, have agreed as follows:

That the Elburgu, Gekunuki, Loita, Damat, and Laitutok sections shall remove absolutely to Laikipia, and the boundaries of the settlement shall be, approximately, as follows: . . .

And by the removal of the foregoing sections to the reserve we undertake to vacate the whole of the Rift Valley, to be used by the government for purposes of European settlement. Further, that the Kaptei, Matapatu, Ndogalani, and Sigarari sections shall remove into the territory originally occupied by them to the south of Donyo Lamayu (Ngongo), and the Kisearian stream, and to comprise within the area the Donyo Lamuyu, Ndogalani, and Matapatu mountains, and the Donyo Narok, and to extend to Sosian on the west.

In addition to the foregoing, Lenana, as Chief Lybon, and his successors, to be allowed to occupy the land lying in between the Nbagathi and Kisearian streams from Donyo Lamuyu to the point where both streams meet, with the exception of land already occupied by Mr. Oulton, Mr. McQueen, and Mr. Paterson.

In addition to the foregoing, we asked that a right of road to include certain access to water be granted to us to allow of our keeping up communications between the two reserved areas, and further, that we be allowed to retain control of at least five square miles of land (at a point on the slopes of Kinangop to be pointed out by Legalishu and Masakondi), whereat we can carry out our circumcision rites and ceremonies in accordance with the custom of our ancestors.

We ask, as a most important point in this arrangement, that the government will establish and maintain a station on Laikipia, and that officers whom we know and trust may be appointed to look after us there.

Also that the government will pay reasonable compensation for any Masai cultivation at present existing near Nairobi.

In conclusion, we wish to state that we are quite satisfied with the foregoing arrangement, and we bind ourselves and our successors, as well as our people, to observe them.

We would, however, ask that the settlement now arrived at shall be enduring so long as the Masai as a race shall exist, and that European or other settlers shall not be allowed to take up land in the settlements.

In confirmation of this agreement, which has been read and fully explained to us, we hereby set our marks against our names as under:

Lenana, son of Mbatian, Lybon of all the Masai.
Masakondi, son of Arariu, Lybon at Naivasha.
Signed at Nairobi, August 15th, 1904:
Lemani, Elmura of Matapatu.
Leteregi, ditto.
Lelmurua, Leganan of Kapte.
Lakombe, Elmura of Kapte.
Limgiseng, Elmura of Ndogalani.
Lisiari, ditto.
Mepaku, Head Elmoran of Matapatu.
Lambari, Leganon of Ndogalani.
Naivasha, representing Elburgu, Gekunuku, Loita, Damat, and Laitutok.
Legalishu, Leganan of Elburgu.
Olmugesa, ditto.
Olainomodo, ditto.
Olotogia, ditto.
Olieti, ditto.
Lanairugu, ditto.
Lingaldu, ditto.
Ginomun, ditto.
Liwala, Leganan of Gekunuki.
Lembogi, Leganan of Laitutok.
Signed at Nairobi, August 15th, 1904:
Sabori, Elmura of Elburgu.

I, Donald Stewart, K.C.M.G., His Majesty's Commissioner for the East Africa Protectorate, hereby agree to the foregoing, provided the Secretary of State approves of the agreement, and in witness thereof I have this 10th day of August, 1904, set my hand and seal.

We, the undersigned, being the Paramount Chief of all the Masai and his regents and the representatives of that portion of the Masai tribe living in the Northern Masai Reserve, as defined in the agreement entered into with the late Sir Donald William Stewart, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, his Majesty's Commissioner for the East Africa Protectorate, on the ninth day of August, one thousand nine hundred and four, and more particularly set out in the proclamation of May thirtieth, one thousand nine hundred and six and published in the *Official Gazette* of June first, one thousand nine hundred and six, do hereby on our own behalf and on behalf of our people, whose representatives we are, being satisfied that it is to the best interest of their tribe that the Masai people should inhabit one area and should not be divided into two sections as must arise under the agreement aforesaid whereby there were reserved to the Masai tribe two separate and distinct areas of land, enter of our own free will into the following agreement with Sir Edouard Percy Cranwill Girouard, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Member of the

Distinguished Service Order, Governor and Commander in Chief of the East Africa Protectorate, hereinafter referred to as the Governor.

We agree to vacate at such time as the Governor may direct the Northern Masai Reserve which we have hitherto inhabited and occupied and to remove by such routes as the Governor may notify to us, our people, herds, and flocks to such area on the south side of the Uganda Railway as the Governor may locate to us, the said area being bounded approximately as follows and as shown on the attached map. . . .

Provided that nothing in this agreement contained shall be deemed to deprive the Masai tribe of the rights reserved to it under the agreement of August ninth, one thousand nine hundred and four, aforesaid, to the land on the slopes of Kinopop whereon the circumcision rights and ceremonies may be held.

In witness whereof and in confirmation of this agreement which has been fully explained to us we hereby set our marks against our names as under:

Mark of Segi, son of Ol-onana (Lenana), Paramount Chief of all the Masai.
Mark of Ol-le-Gelesho (Legalishu), Regent during the minority of Segi, head of the Molelyan Clan, and chief spokesman (Ol-aigwenani) of the Il-Kitoip (Il-Merisho) age-grade of the Purko Masai.
Mark of Ngaroya, Regent during the minority of Segi, of the Aiser Clan.
Mark of Ol-le-Yeli, head of the Mokesen Clan of the Purko Masai, and one of the spokesmen (Ol-aigwenani) of the Il-Kitoip (Il-Merisho) age-grade of the Purko Masai.
Mark of Ol-le-Turere, head of the Mokesen Clan of the Purko Masai.
Mark of Ol-le-Malit, one of Masikondi's representatives, of the Lughumae branch of the Aiser Clan of the Purke Masai.
Mark of Ol-le-Nakola, head of the Tarosero Clan of the Purko Masai
Mark of Ol-le-Naigisa, head of the Aiser Clan of the Purko Masai.
Mark of Marmaroi, uncle and personal attendant of Segi.
Mark of Saburi, the Prime Minister of the Late Chief Ol-onana (Lenana) and principal elder of the Southern Masai Reserve.
Mark of Agali, uncle of Segi, representing the Loita Masai.
Mark of Ol-le-Tanyai of the Tarosero Clan, chief spokesman (Ol-aigwenani) of the Lemek (Meitaroni) age-grade of the Purko Masai.

The above set their marks to this agreement at Nairobi on the fourth day of April, nineteen hundred and eleven.

A. C. Hollis,
Secretary, Native Affairs.

Ol-le-Masikondi, head of the Lughumas section of the Aiser Clan; chief elder of the Purko Masai, called in the former treaty Ol Oiboni of the Purko Masai.
Ol-le-Batiet, head of Aiser Clan of the Purko Masai on Laikipia, Ol-Aigwenani of the age [? age-grade] known as Il Merisho.

The above set their marks to this agreement at Rumuruti on the 13th day of April, nineteen hundred and eleven.

E. D. Browne,
Assistant District Commissioner, Laikipia.

In consideration of the above, I, Edouard Percy Cranwill Girouard, Knight Commander of the Most Distinguished Order of St. Michael and Saint George, Member of the Distinguished Service Order, Governor and Commander-in-Chief of the East Africa Protectorate, agree on behalf of His Majesty's Government, but subject to the approval of His Majesty's Principal Secretary of State for the Colonies, to reserve for the exclusive use of the Masai tribe the area on the south side of the Uganda Railway as defined above, . . . and to undertake on behalf of His Majesty's Government to endeavour to remove all European settlers from the said areas and not to lease or grant any land within the said areas (except such land as may be required for mining purposes or for any public purpose) without the sanction of the Paramount Chief and the representatives of the Masai tribe.

In witness whereof I have hereunto set my hand and official seal this twenty-sixth day of April, one thousand nine hundred and eleven.

Signed, sealed and delivered by the within-named Sir Edouard Percy Cranwill Girouard in the presence of A. C. Hollis.

(L. S.)
E. P. C. GIROUARD.

The parties to the first agreement are "the Lybon and Chief (representatives) of the existing clans and sections of the Masai tribes in the East Africa Protectorate" and His Majesty's Commissioner, acting under instructions from the Secretary of State.

The parties to the second agreement are "the Paramount Chief of all the Masai and his regents and the representatives of that portion of the Masai tribe living in the Northern Masai Reserve as defined in the former agreement," and the Governor, acting under instructions from the Secretary of State.

Now, both these agreements were entered into by the representatives of the Crown in the East Africa Protectorate, in which the King exercises powers by virtue of the Foreign Jurisdiction Act, 1890, and for which with the advice of his Privy Council he ordered in 1902 that—

The Commissioner shall administer the Government of East Africa in the name and on behalf of His Majesty, and shall do and execute in due manner all things that shall belong to his said command, and to the trust thereby reposed in him, according to the several powers and authorities granted or appointed to him by virtue of this Order and of his commission, and according to such instructions as may from time to time be given to him under His Majesty's Sign Manual and Signet, or by Order of His Majesty in Council, or by His Majesty through a Secretary of State, and according to such laws as are or shall hereafter be in force in the Protectorate.[3]

The Commissioner therefore in 1904, and the Governor (with like powers) in 1911, were both consequently acting within their authority

[3] Order in Council 1902(3).

in entering into the agreements mentioned "on the instructions of His Majesty through a Secretary of State."

Now, the other parties to these agreements were persons whom the Commissioner and Governor, acting on behalf of the Crown, chose as representatives of the Masai tribe who with the Crown could enter into such agreements. The Masai tribe as living within the limits of the East Africa Protectorate are not subjects of the Crown, nor is East Africa British territory. But East Africa being a Protectorate in which the Crown has jurisdiction is in relation to the Crown a foreign country under its protection, and its native inhabitants are not subjects owing allegiance to the Crown but protected foreigners, who, in return for that protection, owe obedience.

For this view as to the status of a protectorate "which has never been acquired by settlement, or ceded to, or conquered, or annexed by His Majesty, or recognized by His Majesty as part of his dominions," and of the status of the native inhabitants thereof, I need only refer to the case of the King *v.* the Earl of Crewe (2 K. B., 1910, p. 577).

The real parties to these two agreements are therefore on one side the Crown, and on the other the Paramount Chief and leading representatives of a native tribe in a foreign country under the protection of the Crown.

The main matters which are the subject of the agreements are the areas which the protecting power of the country is to reserve for that tribe as apart and distinct from the subjects of the Crown living in the same country.

In my opinion there is here no legal contract as alleged between the Protectorate Government and the Masai signatories of the agreements, but the agreements are in fact treaties between the Crown and the representatives of the Masai, a foreign tribe living under its protection. I will now consider the plaintiffs' claims and the acts of which they complain.

The plaintiffs claim as individuals and also on behalf of the Masai of Laikipia, and also on behalf of the Masai tribe generally, that the treaty made between the Masai and His Majesty's late Commissioner, Sir Donald Stewart, in 1904, is still in force and effect, and that the obligations undertaken therein are still binding on His Majesty's Government.

The defendants Nos. 2–19 are brought on the record as signatories to the agreement made in 1911 whereby they agreed that they and the

other Masai should leave Laikipia; these defendants having no authority to enter into such an agreement and such agreement being void except as regard the said defendants.

The first three plaintiffs and the other Masai of Laikipia have been and are being wrongfully removed from the Laikipia district in breach of the said agreement of 1904.

The plaintiffs therefore claim.

I. A declaration against the defendants Nos. 1, 20 and 21 that the plaintiff and the other Masai of Laikipia and the other members of the Masai tribe generally, with the exception of the defendants Nos. 2 to 19 inclusive, are still entitled to—

(a) The Laikipia district extended as aforesaid as equitable tenants in common in unbarable entail; and
(b) To an easement of road as aforesaid between the Northern and Southern Masai Reserves; and
(c) That the 1911 agreement is not binding on the plaintiffs and the other Masai of Laikipia and the other members of the Masai tribe generally with the exception of the defendants Nos. 2–19.

II. To £5,000 damages against the 1st defendant for failing to provide the road as agreed in the 1904 agreement; and

III. To an inquiry as to damages against the 1st, the 20th, and 21st defendants—

(a) arising from the death of stock occasioned by such stock being illegally removed from the Laikipia district;
(b) arising from the depreciation on the value of stock wrongfully removed from the said Laikipia district.

IV. All necessary accounts and inquiries and such further and other relief as the nature of the case may require.

V. As against the 20th and 21st defendants an injunction restraining them from preventing the return of the plaintiffs and their stock to the Laikipia district; and against them compelling any of the Laikipia Masai and their stock to move from the said Laikipia district.

VI. Costs.

The above reliefs with the exception of No. V are claimed against

the Crown, and Nos. I, III and V also against the 20th and 21st defendants on the grounds that the government having by the 1904 agreement become trustees for the Masai, they failed to execute their trust, but entered into another agreement in 1911 contrary to the former one and derogatory to the interests of their *cestui que trusts*, and that the later agreement was obtained by duress, and is further not binding as it has not received the approval of the tribe, and that the losses they allege they have suffered are due to the government executing the terms of the second agreement in violation of the first, which still continued to exist.

Now, are the acts of defendants complained of by the plaintiffs Acts of State?

The answer to this is, in my opinion, contained in my finding that both the agreements are in fact treaties. For it follows from that finding that there was no such contractual relationship as alleged between the parties, and that in this action the plaintiffs are seeking by means of the court to enforce the provisions of a treaty.

The Paramount Chief himself could not bring such an action, still less can his people (Feather *v.* Queen, 35 L. J. K. B., 208 and Buron *v.* Denman, 2 Exchcq. 167).

As regards the plea of duress and the want of approval of the tribe to the second agreement, as affecting its validity, it is not within the competence of this court, having held the agreement to be a treaty, to consider its validity as affected either by the *pourparlers* before its signature or a want of authority on the part of the signatories.

As to the alleged losses incurred by the plaintiffs, they themselves plead that defendants 20 and 21 were the agents of the government acting in pursuance of the orders of the government or Secretary of State in carrying out the second agreement, which pleading is accepted by both of these defendants as their defence. Such an action as against them is founded on tort and will not lie, and their acts in carrying out the terms of a treaty having been on instructions from and adopted by the government are as much Acts of State as the treaty itself.

Relief V claimed as against these defendants for similar reasons is not one that this court could grant as it would in its crudest form be an injunction to officers of the government to prevent them carrying out an Act of State.

The remaining defendants on the record are merely nominal as signatories to the 1911 agreement and no relief is claimed as against them.

I hold therefore on the issue before me that the acts of the defendants

complained of by the plaintiffs are in fact Acts of State which are not cognizable by a municipal court.

The Crown, acting through its Commissioner, first made one treaty with the Masai, and subsequently acting through the Governor modified that treaty by another, and I cannot do better than adapt to the present case the concluding words of Lord Kingsdown in giving judgment in the Privy Council in the case of Secretary of State for India *v.* K. B. Sahaba (XIII Moore 22): "It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which this court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy."

The action is dismissed with costs.

R. W. HAMILTON.

26 May, 1913.

LAPINA *v.* WILLIAMS, COMMISSIONER OF IMMIGRATION.

Supreme Court of the United States.

[232 U. S. 78.]

January 5, 1914.

[The facts are stated in the opinion.]

Mr. Justice Pitney delivered the opinion of the court.

The petitioner, an unmarried woman and a native of Russia, came to the United States in the year 1897 or 1898, at the age of about twelve years, accompanied by a man who had promised to marry her, and during the four years immediately following she practiced prostitution in the City of New York and supported her companion with the proceeds of her prostitution; she then left that city, and thereafter continuously practiced prostitution in various parts of the United States, including different towns and cities in the States of Washington, Arizona, and Texas. In the month of March, 1908, she returned to Russia for the purpose of visiting her mother, intending at the same time to return to this country; she reëntered the United States at the port of New York

in June, 1908, accompanied by her mother, at which time petitioner falsely represented, for the purpose of facilitating her landing, that she was Mrs. Joseph Fiore, and the wife of an American citizen; at the time of this, her second entry, she intended to continue the practice of prostitution in the United States, and almost immediately upon being admitted she engaged in that practice, and was continually engaged in it until September 21, 1909, on which date she was arrested in a house of prostitution in Phœnix, Arizona, upon a warrant of arrest duly issued by the Acting Secretary of Commerce and Labor under the provisions of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898. Upon a hearing properly accorded to her, the foregoing facts were established, and an order of deportation was made upon the ground that she was a prostitute and was such at the time of her entry into the United States; that she entered the United States for the purpose of prostitution; and that she had been found an inmate of a house of prostitution and practicing the same within three years after her entry. She obtained a writ of *habeas corpus*, which, after a hearing, was dismissed by the District Court for the Southern District of New York. Upon appeal, the Circuit Court of Appeals affirmed the order of dismissal (*sub nom. Ex parte* Hoffman, 179 Fed. Rep. 839). The present writ of certiorari was then allowed because of the division of judicial opinion upon the question presented, which is whether the provisions of the Immigration Act of 1907 respecting admission and deportation apply to an alien such as the petitioner, who, having remained in this country for more than three years (in this instance for more than ten years), after first entry, and having gone abroad for a temporary purpose and with the intention of returning, again seeks and gains admittance into the United States.

The pertinent provisions of the Act of 1907 are set forth in the margin.[1]

[1] Sec. 2. That the following classes of aliens shall be excluded from admission into the United States . . . prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose; . . . 34 Stat. 898.

Sec. 3 . . . any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this Act. 34 Stat. 899.

Sec. 20. That any alien who shall enter the United States in violation of law . . . shall, upon the warrant of the Secretary of Commerce and Labor, be

So far as the present question is concerned, the Act is not materially different from—certainly not less stringent than—the Act of March 3, 1903 (32 Stat. 1213, c. 1012). The Circuit Court of Appeals in the present case followed its own decision in Taylor *v.* United States, 152 Fed. Rep. 1, which was based upon the Act of 1903, and in which it was held that while the provisions of the Act of March 3, 1891 (26 Stat. 1084, c. 551) had been construed as restricted to "alien immigrants," the Act of 1903 had been so framed as to cover aliens whether immigrants or not. In behalf of the petitioner it is contended that the court erred in its judgment as to the purpose of Congress in modifying the language of previous Acts on adopting the revision of 1903, and that this Act and the Act of 1907, as well as those that preceded them, when properly construed, refer to "alien immigrants" exclusively.

The Acts of 1903 and 1907 being revisions or compilations (with some modifications) of previous Acts pertaining to the same general subject-matter, a reference list, in chronological order, is for convenience set forth in the margin.[2]

taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. 34 Stat. 904.

Sec. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this Act, . . . 34 Stat. 905.

[2] Immigration Acts: Rev. Stat. Title "Immigration," §§ 2158–2164.

"An Act supplementary to the Acts in relation to immigration," approved March 3, 1875, 18 Stat. 477, c. 141.

"An Act to regulate Immigration," approved August 3, 1882, 22 Stat. 214, c. 376.

"An Act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," approved February 26, 1885, 23 Stat. 332, c. 164.

"An Act to amend an Act to prohibit the importation and immigration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," approved February 23, 1887, 24 Stat. 414, c. 220.

"An Act making appropriations to supply deficiencies," etc., approved October 19, 1888, containing clauses amending Acts of February 26, 1885, and of February 23, 1887, 25 Stat. 565, 566, 567, c. 1210.

"An Act in amendment to the various Acts relative to immigration and the importation of aliens under contract or agreement to perform labor," approved March 3, 1891, 26 Stat. 1084, c. 551.

In a number of cases in the Federal District and Circuit Courts, it was held that the provisions of the Act of March 3, 1891, and the Acts that preceded it, relating to the exclusion and deportation of persons arriving in the United States from foreign countries, were confined in their operation to "alien immigrants;" and that this term did not include aliens previously resident in this country, who had temporarily departed with the intention of returning. *In re* Panzara (1892), 51 Fed. Rep. 275; *In re* Martorelli (1894), 63 Fed. Rep. 437; *In re* Maiola (1895), 67 Fed. Rep. 114; *In re* Ota (1899), 96 Fed. Rep. 487. The same view was expressed by the Circuit Court of Appeals for the Ninth Circuit in Moffitt *v.* United States (1904), 128 Fed. Rep. 375.

Upon the reasoning and authority of these cases, a similar construction was given to the Act of 1903 in United States *v.* Aultman Co. (1906), 143 Fed. Rep. 922 (affirmed by the Circuit Court of Appeals, 148 Fed. Rep. 1022), the attention of the court apparently not having been directed to the question whether any significant change had been made in the law by the revision of 1903.

But in Taylor *v.* United States (1907), 152 Fed. Rep. 1, which was a review by the Circuit Court of Appeals for the Second Circuit of a judgment of conviction upon an indictment for a misdemeanor for permitting an alien sailor to land in New York, contrary to § 18 of the Act of 1903, which made it the duty of the owners, officers, and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien, etc., the court reviewed the changes made by Congress in the revision of 1903, "following decisions of the courts which tended to relax the provisions of earlier Acts," and, finding that § 18 of the Act of 1903 substantially reënacted a part of 8 of the Act of 1891, employing the term "alien" in the place of the term

"An Act to facilitate the enforcement of the immigration and contract-labor laws of the United States," approved March 3, 1893, 27 Stat. 569, c. 206.

"An Act making appropriations for sundry civil expenses," etc., approved August 18, 1894, containing clauses amending immigration laws 28 Stat. 372, 390, 391, c. 301.

"An Act to regulate the immigration of aliens into the United States," approved March 3, 1903, 32 Stat. 1213, c. 1012.

"An Act to regulate the immigration of aliens into the United States," approved February 20, 1907, 34 Stat. 898, c. 1134.

"An Act to amend an Act entitled 'An Act to regulate the immigration of aliens into the United States,' approved February twentieth, nineteen hundred and seven," approved March 26, 1910, 36 Stat. 263, c. 128.

"alien immigrant," and that similar changes were made in other parts of the Act, came to the conclusion that the change evinced an intent of Congress to use the word "alien" in its ordinary and unqualified meaning. This decision was reviewed in this court, and the judgment was reversed, but upon the ground (207 U. S. 120, 124) that § 18 did not apply to the ordinary case of a sailor deserting while on shore leave.

Shortly after the decision of the Circuit Court of Appeals in the Taylor Case, the Circuit Court of Appeals for the Third Circuit, in Rodgers *v.* United States, *ex rel.* Buchsbaum (1907), 152 Fed. Rep. 346, held that the provision of § 2 of the Act of 1903, enumerating the classes of aliens to be excluded from admission into the United States, and amongst them "persons afflicted with a loathsome or with a dangerous contagious disease," and the provision of § 19, for the deportation of "aliens brought into this country in violation of law," could not be construed so as to extend to aliens domiciled in this country; affirming *In re* Buchsbaum, 141 Fed. Rep. 221. In United States *v.* Nakashima (1908), 160 Fed. Rep. 842, the Circuit Court of Appeals for the Ninth Circuit adopted the same view of the Act of 1903 expressed in the Aultman and Buchsbaum cases, rejecting that adopted by the Court of Appeals in Taylor *v.* United States.

On the other hand, the latter decision has been followed in a number of cases arising under the Act of 1907, which in this respect does not materially differ from the Act of 1903. *Ex parte* Petterson (1908), 166 Fed. Rep. 536; United States *v.* Hook (1908), 166 Fed. Rep. 1007; United States *v.* Villet (1909), 173 Fed. Rep. 500; *Ex parte* Hoffman (1910), 179 Fed. Rep. 839 (being the case now under review); Sibray *v.* United States (1911), 185 Fed. Rep. 401; United States *v.* Williams (1911), 186 Fed. Rep. 354; United States *v.* Sprung (1910), 187 Fed. Rep. 903; Frick *v.* Lewis (1912), 195 Fed. Rep. 693; Siniscalchi *v.* Thomas (1912), 195 Fed. Rep. 701. *Contra*, Redfern *v.* Halpert (1911), 186 Fed. Rep. 150; and see United States *v.* Rodgers (1911), 191 Fed. Rep. 970.

The authority of Congress over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country. Chinese Exclusion Case, 130 U. S. 581, 603; Nishimura Ekiu *v.* United States, 142 U. S. 651, 659; Fong Yue Ting *v.* United States, 149 U. S. 698, 713; Lem Moon Sing *v.* United States, 158 U. S. 538, 547.

The question, therefore, is not the power of Congress, but its intent and purpose as expressed in legislation. The cases that have held the immigration Acts not to apply to domiciled aliens returning after a

temporary absence have been rested in part upon the use of the term "immigration" in the titles of the respective Acts, and in part upon the employment of that or similar terms in the enacting clauses.

As authority for a liberal interpretation of the Acts, two decisions of this court have at times been referred to, which have, however, little, if any, present pertinency. Holy Trinity Church *v.* United States, 143 U. S. 457, held that the Contract-Labor Law of February 26, 1885 (23 Stat. 332, c. 164), did not forbid a contract for employing a clergyman. The Act was construed according to its spirit rather than its letter, and in view of its title, the evil intended to be remedied, the circumstances surrounding the appeal to Congress for legislation, and the reports of committees in each House, it was held to be the legislative purpose simply to stay the influx of cheap unskilled labor. Since this decision, an express exception has been made of "ministers of any religious denomination." In Lau Ow Bew *v.* United States, 144 U. S. 47, this court held that the provision of the Chinese Restriction Act of May 6, 1882 (22 Stat. 58, c. 126, § 6) as amended by Act of July 5, 1884 (23 Stat. 115, c. 220), requiring every Chinese merchant coming into this country to procure and produce a certificate from the Chinese Government, did not apply to Chinese merchants already domiciled in the United States, who, having left this country for some temporary purpose, sought to reënter it upon their return to their homes here. But this decision was based in part upon the language of the particular statute and in part upon the fact that our treaty with China gave to Chinese merchants domiciled in the United States the right of egress and ingress, and the other rights, privileges, and immunities enjoyed in this country by the citizens or subjects of the most favored nation.

The legislative history of the Act of 1903 demonstrates that the elimination of the word "immigrant" and other equivalent qualifying phrases was done deliberately. The bill originated in the House of Representatives, where the committee report declared that its general purpose was "to bring together in one Act scattered legislation heretofore enacted in regard to the immigration of aliens into the United States . . . to amend such portions thereof as have been found, either as the result of experience in administering the law *or of judicial decision*, to be inadequate to accomplish the purpose plainly intended thereby; and to add thereto such further provisions as seem to be demanded by the consensus of enlightened public opinion." H. Rept. 982, 57th Cong., 1st Sess. The report of the Senate committee likewise

explained the bill as being in the main a reënactment of existing laws on the subject of immigration, stating—"The necessity for such reënactment is due in part to the fact that, *as a result of judicial decisions*, as well as of administrative experience, the efficiency of such laws to accomplish the evident purpose of their enactment has been shown to be materially less than appeared to be the case at the time of such enactment, and therefore a new expression of the legislative will upon the subject of immigration has become desirable." The Senate inserted the word "immigrant" in one place, but it was eliminated in conference. S. Rept. 2119, 57th Cong., 1st Sess.; S. Doc. 62, 57th Cong., 2nd Sess.; Cong. Record, Vol. 36, p. 2949, 57th Cong., 2d Sess.

Counsel for petitioner cites the debates in Congress as indicating that the Act was not understood to refer to any others than immigrants. But the unreliability of such debates as a source from which to discover the meaning of the language employed in an Act of Congress has been frequently pointed out (United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 318, and cases cited), and we are not disposed to go beyond the reports of the committees. Holy Trinity Church *v.* United States, 143 U. S. 457, 463; Binns *v.* United States, 194 U. S. 486, 495; Johnson *v.* Southern Pacific Co., 196 U. S. 1, 19.

It is earnestly insisted that the omission of the word "immigrant" is of little consequence, because it does not apply at all to the excluding section. It is said that the words "alien immigrant" did not occur in the acts of 1875, 1882, 1885, or 1887, and did not occur in the excluding section of the Act of 1891, but only in its eighth section—that which related to manifesting. But in the Act of 1893, "To facilitate the enforcement," etc., each section was made to apply to "alien immigrants." The force of the argument pretty well disappears when we recall that it was in spite of the absence of the word "immigrant" in the excluding clause that courts had held that because the word occurred in the title and in other provisions of the pertinent Acts, the excluding clauses likewise were confined to immigrants, in the sense of aliens who had no domicile in this country. Of course, there were other considerations; the extreme hardship in individual cases where the aliens had long been resident in this country, and the practically uncontrolled authority of the executive officers of the government, being among them. But, whatever considerations may have combined to bring about the judicial interpretation of the Acts that preceded the revision of 1903, the committee reports already cited sufficiently show that the language of the

new Act was chosen not for the purpose of adopting, but in order to avoid, that interpretation.

Upon a review of the whole matter, we are satisfied that Congress, in the Act of 1903, sufficiently expressed, and in the Act of 1907 reiterated, the purpose of applying its prohibition against the admission of aliens, and its mandate for their deportation, to all aliens whose history, condition or characteristics brought them within the descriptive clauses, irrespective of any qualification arising out of a previous residence or domicile in this country.

The excluding section as found in the Act of 1907 contains in its own language the clearest answer to the entire argument for the petitioner. It reads as follows (34 Stat. 898, c. 1134, § 2):

> That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or persons who admit their belief in the practice of polygamy, anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assassination of public officials; prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose; persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled; etc., etc.

None of these excluded classes (with the possible exception of contract laborers, whose exclusion depends upon somewhat different considerations) would be any less undesirable if previously domiciled in the United States. And besides, the section contains its own specific provisos and limitations, and these, on familiar principles, strongly tend to negative any other and implied exception.

There remains, therefore, only the use of the word "immigration" in the title of the Act to furnish support for petitioner's contention.

But it is only in a doubtful case that the title of an Act can control the meaning of the enacting clauses, and there is no such doubt here. United States *v.* Fisher, 2 Cranch, 358, 386; Holy Trinity Church *v.* United States, 143 U. S. 457, 462; Coosaw Mining Co. *v.* South Carolina, 144 U. S. 550, 563; Patterson *v.* Bark Eudora, 190 U. S. 169, 173; Cornell *v.* Coyne, 192 U. S. 418, 430.

It was not intended, in the opinion of this court in Taylor *v.* United States, 207 U. S. 120, 126, to intimate an opinion with respect to the construction of § 18 of the Act of 1903 that is inconsistent with the result now reached. There the Circuit Court of Appeals (one judge dissenting) had construed that section as excluding even the ordinary sailor, if an alien; basing this construction upon the changes wrought by Congress in the revision of 1903. This court, speaking by Mr. Justice Holmes, said:

> "A reason for the construction adopted below was found in the omission of the word 'immigrant' which had followed 'alien' in the earlier Acts. No doubt that may have been intended to widen the reach of the statute, but we see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the Act who did not come here with intent to remain. It is not necessary to regard the change as a mere abbreviation, although the title of the statute is "An Act to regulate the immigration of aliens into the United States."

Of course, this language was employed with reference to the facts of that case, and was not intended to negative a purpose on the part of Congress to bring within the reach of the statute aliens who had previously resided in this country. In that case there was no element of previous residence.

Judgment affirmed.

The United States and Mexico—1821–1848. A History of the relations between the two countries from the independence of Mexico to the close of the war with the United States. By George Lockhart Rives. New York: Charles Scribner's Sons, 1913. 2 vols. pp. 720, 726.

The importance of the war with Mexico of 1846–48 and of the treaty of Guadalupe-Hidalgo, which closed it, has been overshadowed in the minds of the American people by the mighty conflict for international existence which closely followed it. It is not generally realized that more than half of the territory of Mexico became by that treaty a part of the United States.

The book before us is an account of our relations with Mexico from the time she achieved her independence from Spain until 1848, when California and New Mexico were ceded by her to the United States, and when she acknowledged what had long been an accomplished fact—the independence of Texas from Mexican control and her annexation to the United States. The work is founded on a thorough study of the original sources and is written with such impartiality that the author often seems rather to leave it to the reader to pass judgment upon the men and actions described than to give his own conclusions.

The ability of President Polk as a diplomatist is put in a strong light by the account of his negotiations with Great Britain as to the boundaries of what was then known as the "Oregon country," that is, the country west of the Rocky Mountains and north of California. Our treaty of 1818 with Great Britain fixed the forty-ninth parallel of north latitude as the international boundary line from the Lake of the Woods to the Rocky Mountains, and provided for joint occupation of the country to the west of those mountains. As time went on and the country settled up, joint occupation became more and more embarrassing, until, in the early forties, the question brought us to the verge of war with England. President Polk, by combined firmness and courtesy, effected a settlement by the extension of the line of the forty-ninth parallel to the Pacific Ocean. This settlement, far from being (as has often been represented) a

surrender of the rights of the United States, fixed the line which had been repeatedly proposed to England as the nearest approximation possible to exact international justice. The treaty of 1846, which closed the controversy in a manner which cemented the peace of the two countries and has proved so equitable and satisfactory coincided in time with the outbreak of the conflict with Mexico.

If President Polk's diplomacy was not so successful in our relations with Mexico, it was due to radical differences in national character and temperament between the people of the United States and those of Mexico.

One of the most illuminating passages of these volumes (I, 95–102) describes the composition of the Mexican nation and the fundamental differences between the circumstances of the settlement of that country and of the United States. It is impossible at the present day, when relations with Mexico have again reached a stage of the most acute importance, to appreciate the problems of today without studying these differences.

Several misapprehensions of persistent vitality are cleared up by this work. It has been repeatedly alleged that Texas formed a part of the vast territory of indefinite bounds purchased from France in 1803, under the name of Louisiana, and that the treaty of 1819 with Spain, by which the Sabine River was fixed as the western boundary of Louisiana, constituted a surrender of a large part of the purchased province. This theory is examined by our author, and pronounced to be without foundation. The struggle of Texas for independence, as well as the movement both in Texas and in the United States for the annexation of that State, did not grow out of a desire to extend the sway of the institution of slavery, but was part of the general westward movement, with its accompanying desire for expansion. Opposition to the extension of slave territory did, indeed, form an important argument against the annexation of Texas, as did the apprehension of a further spread of slavery against the acquisition of New Mexico and California. The war with Mexico is shown to have originated not so much out of the annexation of Texas (which was an accomplished fact for nearly a year before its outbreak) as it did from the determination of President Polk's administration to obtain satisfaction for the numerous claims of our citizens against Mexico. These claims that country had neither the desire, nor the resources, to meet; and the administration at Washington believed they could only be satisfied by means of territorial acquisitions.

Behind all of President Polk's negotiations with Mexico was a keen appreciation of the importance of California—then, practically a derelict—to the United States, an idea in which (as our author remarks) "he was far in advance of the public opinion of his time."

Attempts at negotiation with Mexico—whether for the recognition of the long accomplished independence of Texas, or for the settlement of our indemnity claims, or for the peaceful acquisition of California—proved fruitless. The mere fact that a government was known to be negotiating with the United States on any of these subjects almost sufficed to bring about its overthrow. Thus the very weakness of the government tended to embroil it with the United States.

When the war had actually begun, the manner in which it was conducted by the invading army set a model for the conduct of hostilities for all times:

"Never, he (the American Secretary of State) asserted—and with some justice—had war been levied by invading forces in such a manner. Fair or even extravagant prices had been paid for supplies. Private property had been held sacred. Famishing Mexican soldiers had been fed and their wounds bound up." (II, 522.)

A statement which will be new and surprising to most readers of this work is, that at the close of hostilities and while terms of peace were under consideration, a large and influential party among the Mexicans was opposed to the evacuation of the country by the United States and preferred that the Americans should remain permanently in occupation. This plan failing, "proposals were actually made to [General] Scott to have him issue a *pronunciamiento* and declare himself dictator after the ratification of the treaty of peace. This amazing plan contemplated the organization of an army of Americans, to be recruited from the men discharged at the close of the war, which Scott thought 'would suffice to hold the republic in tranquillity and prosperity. * * * Being already in possession of the principal forts, arsenals, foundrys, mines, ports of entry and cities, with nearly all the arms of the country, it was not doubted that a very general acquiescence would soon have followed.' Scott states that he 'ultimately' declined the overtures made to him, although 'highly seductive both as to power and fortune.'"

In the end, the treaty of Guadalupe-Hidalgo was concluded by an unauthorized negotiator. Trist, chief clerk of the State Department, had been sent by our government to accompany the army and take advantage of the proper time to conclude a treaty of peace, the terms of

which were definitely fixed by his instructions. On the rejection by the Mexican Government of the terms first offered, Trist was peremptorily recalled and the Mexican Government formally notified of the termination of his authority. In defiance of his recall, and with full knowledge on the part of the Mexican Government that he was without authority, a treaty was negotiated and signed. As, however, it conformed to his original instructions, it was accepted by the President and ratified by the Senate.

The work is written in a most attractive style and illustrated with ample maps and plans. The present difficulties in Mexico are incomprehensible without a knowledge of the course of her history during the first half of the nineteenth century as related in this book. While the present situation presents a more serious problem than any which has previously occurred, the reader of these volumes will, in many places, find reminders that many of the difficulties of the present day find a striking parallel in the earlier history of the country.

GEORGE A. KING.

Il Canale di Panama. By Enrico Catellani. Roma: Tipografia dell 'Unione Editrice, 1913. pp. 114, map.

In this pamphlet of 114 pages Professor Catellani has reprinted from the *Rivista Coloniale* his study of the international problems arising out of the approaching completion of the Panama Canal and the legislation on the subject adopted by the United States.

The limits of the article permit only of the most summary sketch of the history of the project, but the relevant facts are clearly enough and quite dispassionately stated, and noticeably without importing controversial matter or displaying any tendency either to undue criticism or enthusiasm.

The interest of the author in fact relates to the neutralization or semi-neutralization of the Canal, and to the Hay-Pauncefote Treaty as it bears upon the two subjects of fortification and of the exemption of coastwise shipping from tolls.

As a matter of fact, he would doubtless deny that the term neutralization is properly to be applied to the status of the Panama Canal at all: its exemption from warlike uses depends entirely on the clause of the treaty between Great Britain and the United States, modelled on, though not precisely following, the similar clauses of the convention relating to the Suez Canal. As between the two parties to the treaty

there is a mutual obligation; as towards other nations interested there is a mere promise without consideration, practically ineffectual because these nations are not themselves in any way bound to respect the neutrality: and the sole guarantee for the continuance of the status is in fact the armed power of the United States.

Neutralization, properly speaking, is necessarily an effect not merely of joint but of general action, and a guarantee resting merely on the power of a single nation is evidently imperfect. The analogy to the status of the Canal is in fact to be found not at Suez, but much more nearly in the Kiel Canal.

If it furnished a complete analogy the matter would be simple enough, and as a matter of fact since the acquisition of the Canal Zone a strong tendency has existed in the United States to regard it primarily as a domestic enterprise on native territory.

Against this is the existence of the Hay-Pauncefote Treaty, entered into when the territory in question did not yet belong in any sense to the United States, and creating very definite obligations towards Great Britain.

The question of the construction of the treaty first presented itself in connection with the proposal to fortify. The British Government did not think proper to make any protest on the subject, and the unofficial protest whether in the United States or abroad was not weighty enough to secure serious attention. Professor Catellani does not conceal his own view that the fortification was inconsistent with the intent of the treaty, and a quite unwarranted extension of the clause providing for the policing of the Canal.

The author's analysis of the motives influencing the conduct of the United States in reference to the Canal in its later development indicates three main factors,—political interests, economic interests, and a contemplated creation of a new system of international law embodying the spirit of the Monroe Doctrine but widely extended to cover all interstate relations on the American Continent. The idea of fortification is in fact represented as a development not so much of the duty assumed by treaty of policing the Canal, as of the voluntarily assumed duty of policing the sister states of the continent.

Political reasons would therefore appear to have governed the decision and attitude of the United States in the matter of fortification: economic reasons have been controlling in the question of tolls. The statesman and the politician regarded the matter as it affected the military and

strategic position of the country; the man of business considered it largely as a possible means of regenerating the lost shipping interests. And politician and business man were inclined to make common cause in the name of patriotism.

These tendencies, of course, finally crystalized in the Panama Canal Act of 1912 exempting coastwise shipping from tolls, and what is perhaps even more alarming to foreign interests, intimating by its terms the reservation of the right by future regulations to favor further the shipping of the United States.

All the European nations possessing any considerable shipping trade are interested in this aspect of the matter, but Britain alone, of course, has any *locus standi* under the treaty of 1901. It is suggested, however, that the other nations interested possess a ground of protest in the repeated intimation of the United States to the effect that no rival enterprise under the auspices of any European nation would be permitted. The suggestion would hardly seem to possess much practical importance whether juridically sound or not. The Monroe Doctrine in all its various developments and extensions is, like "an official utterance," unanswerable.

As against Great Britain at any rate, this position taken in the Act of 1912 is pronounced flatly to be indefensible.

British diplomacy is rather tartly criticised for the "debilitation" which it seems to suffer in crossing the Atlantic, for its successive concessions in the matter of the Clayton-Bulwer Treaty, the amendment of the first draft of the Hay-Pauncefote Treaty, and finally its slowness and moderation in the matter of the tolls.

The attitude of the author in regard to the final disposition of the question is in fact somewhat pessimistic. The main hope of a favorable result he seems to see in the essential interest of the United States, which will sooner or later become evident, to secure an effective joint guarantee of the neutrality of the Canal, a condition which he thinks in a time of more serious or mature consideration "the United States will recognize as indispensable for the security of the Canal and not a matter of indifference for the security of their own commerce and vested interests."

The article was of course written before recent developments in the matter, which give promise of sober second thought leading to a radical modification of the position adopted. And generally it may be said that from the tone of his anticipations he does not altogether appreciate that

the sentiments which lead to what he denominates the "maternal patience" of Britain in diplomatic negotiations with the United States find a certain answer in public feeling and opinion, which are likely in the long run to impose a corresponding check on too radical or uncompromising action even though favored by powerful interests and convictions: and also assuming that the argument as to the meaning of the treaty solemnly entered into is as clear and conclusive as he claims, it was bound in time to penetrate and mould public opinion in the nation, which is necessarily guided to a large extent by national self-interest, but is not by any means insensitive to national honor.

JAMES BARCLAY.

Deutsche Prisengerichtsbarkeit. Dr. jur. Heinrich Pohl. Tübingen: J. C. B. Mohr. 1911. pp. 231.

Das internationale Prisenrecht. Dr. jur. Otto Hirschmann. München and Berlin: J. Schweitzer. 1912. pp. 158.

These two books consider the recent attempts to make prize law truly international law.

The work of Dr. Pohl is a work on prize jurisdiction particularly as relates to German law and practice. The fundamental conceptions of prize jurisdiction are discussed and the changes consequent upon the abolition of privateering are shown to be in the direction of respect for law. In 1907, out of various propositions came at length the plan for the international prize court.

The German laws and regulations of 1884 and 1889 had brought the practice in regard to prize into fairly definite form. These were, however, national laws and while the prize courts might in theory administer international law, they must in fact in many respects give careful heed to national laws.

The idea of making the prize court international is not new in Germany. The ideas of Frederick the Great show the reasonableness of an international prize court. Other German writers and publicists developed the idea during the eighteenth century. The proposition of Hübner advocating the placing of neutrals upon the court which is to decide cases where the neutral national's property is concerned is particularly explained. The influence of writers of the eighteenth century shows a tendency toward a court that should be international in its attitude.

Gessner's plan is discussed as one of the most completely developed

of the ideas of "internationalizing" of the prize court in the nineteenth century. The position of other writers is briefly set forth.

The well known German-English-American coöperation for the prize court convention at the Second Hague Conference, together with the general course of discussion, is related, and the general effect of the proposed convention is explained. The difficulties of deciding what principles the court should follow in cases of conflict of laws and precedents and other difficulties which the court would face are not overlooked. Some of these are in part solved by the Declaration of London. The judicial character of the prize court, if established, must be recognized. The advantages of such a court seem too great to permit of long delay in the realization of the hopes of the early German writers.

The book contains in appendices the German and English propositions which were brought before the Second Hague Conference and the convention which was finally drafted, but remains unratified. There is also a good index.

The work of Dr. Hirschmann, *Das internationale Prisenrecht*, views the subject of prize law in a broad manner. He emphasizes the distinction between the capture of enemy property at sea and the capture of neutral property at sea. The course of discussion upon the exemption from capture of private property at sea in time of war is presented at length. This is familiar to American readers from the work of the American delegations at the First and at the Second Hague Conferences. The American position on this question, the British proposition in regard to the abolition of contraband, and the effects of these upon the ideas of blockade are shown.

The definition of many ideas by the Declaration of London of 1909 and the significance of these definitions is discussed in a clear fashion. The tendency to guard the rights of neutrals more carefully and to put the burden of war upon the belligerents is everywhere evident.

The development of prize law seems to show a growing recognition that property even in time of war should not be taken without due process of law.

A closing chapter presents the relation of the recent propositions in regard to capture on the sea to political questions. The controversy that has been waged in England over the Prize Court Convention and the Declaration of London, described in considerable detail, proves that there are many difficulties besides those of a legal nature which must be met.

These books of Dr. Pohl and of Dr. Hirschmann in many respects are supplementary. The latter affords a convenient review of recent opinion on prize law in a comparatively few pages and shows wide study.

GEO. G. WILSON.

Traité de droit international privé. By J. Westlake. Translation of the 5th Édition (1912), by Paul Goulé; Préface by A. de Lapradelle. Paris: Librairie de la société du Recueil Sirey. 1914. pp. xii, 560.

This translation is one of the Bibliothèque Étrangère of private international law produced under the direction of Professor de Lapradelle of the faculty of law of the University of Paris.

The famous original treatise was first published 56 years ago by Dr. Westlake in 1858, when its learned author was but thirty years of age, and was the cornerstone of his great reputation. A second edition was published in 1880, a third in 1890, a fourth in 1905 and the last, from which the translation is made, in 1912. The lamented death of the learned author occurred April 14, 1913. Dr. Westlake, one of the ripest and clearest writers in both Public and Private International Law, sought mainly in this work to derive his principles from English precedents, and has stated that when he looked abroad "it has almost always been in Europe and not to America" adding "The jurisprudence of the United States in private international law is rich, but it is too like our own to serve my purpose with students, while the practitioner will find its results embodied in the American treatises. It would have required the leisure hours of years to examine the United States decisions as carefully as I have here examined the English ones, and with less care it would have been absurd to compete with their native exponents." This I quote from the preface of his second edition. The translation omits all Dr. Westlake's several prefaces, which is somewhat to be regretted, as they were explanatory of his system, his purpose and scrupulously gave credit to those who had assisted him.

However, the very interesting and illuminating "Preface" contributed to this translation by Professor de Lapradelle covers seven pages and briefly reviews the long life and many distinguished services of Dr. Westlake and expands into a convincing appreciation of the views he has advanced and advocated.

Professor de Lapradelle shows that when this work first appeared, Savigny was known in Germany, Foelix in France and Story in the United States, but that the science of private international law was

not then honored as today. That the English courts tended to follow Story who, notwithstanding his acquaintance with practice and the breadth of his learning, was an imperfect guide in respect to principles. He shows that the old doctrine of Voet was brought from the Netherlands into Great Britain by Scotch advocates who habitually studied law in Holland, and imposed the doctrines of territoriality mitigated by comity. That the land laws of England were so special that great confusion would have been produced by the recognition of foreign laws. He shows the Wills Act of 1861 had not yet declared valid in England the testament made by a foreigner in conformity with the law of the place of its execution.

He finds Westlake's mind too large to agree to this insular conception of private international law based on doctrine and legal technique from which analysis, observation and reason were banished. That he initiated Englishmen in the luminous expositions of Savigny but did not forget that he was a practitioner writing for other practitioners, English like himself. That he was not, like other disciples of Bentham, a philosopher to whom the technicalities of law are foreign, but an English lawyer formed in Lincoln's Inn, learned as a continental professor, but versed in insular law and a member of the English bar. He shows that after twenty-two years of seeming failure to influence jurisprudence, during which, when his work was quoted in court, a judge had asked "When did he live?" by the end of the nineteenth century no English court could decide a question of conflict of law without first consulting him.

He attributes many famous decisions turning on the law of the domicil rather than of the place of the act, to his influence on English courts, citing Udny *v.* Udny, 1869, Sottomayer *v.* de Barros, 1877, Cooper *v.* Cooper, 1888, and Huntly *v.* Gaskell, 1906. He shows that Westlake in his first edition held the principle that capacity to alienate immovables depends on the law of the place of their situation, though he had no precedent. In 1909, in Bank of Africa, Limited, *v.* Cohen, the courts so decided.

He finds Westlake's mind more open to the theories of Continental law than any in England.

It is certainly fit that a work of the scope thus indicated should be made available to readers on the Continent of Europe and to the many there who are conversant with French but not with English. It is not the first time Westlake has been thus honored. Nineteen years ago his

studies in the principles of international law were translated into French by the eminent scholar, E. Nys, and published at Brussels.

Westlake was a leading spirit in founding in 1869 *La Revue de Droit International* and, in 1873, the *Institute of International Law*, of which he was president in 1895 and became honorary president in 1900. He took an active and important part in many Continental meetings and conferences. Moreover, he extended to foreign scholars a most kindly, delightful and constant hospitality, ably assisted by Mrs. Westlake, at his London home, River House, on the Chelsea Embankment, and at his country house near St. Ives in his native Cornwall. The writer recalls with gratitude days of pleasure under his roof and long walks over the hillsides yellow with broom and purple with heather in which, even near the close of life, Dr. Westlake turned with unchanging zeal and undiminished power to the discussion of the principles of international law as he clearly saw and ardently advocated them. He must be regarded as a most potent and useful factor in assimilating English and Continental views and practice. Services of that sort have far more than local or temporary value. The translation of his work into the French tongue aids in that very purpose and the service of Dr. Goulé and the highly appreciative and discriminating preface of Professor de Lapradelle deserve the thanks of those who, like the writer, believe that uniformity of law is one of the important contributions to good will and the maintenance of good relations between nations.

It would be presumptuous to discuss the French of Dr. Goulé. The translation seems faithful. The index of the English edition, covering 35 pages, is necessarily rewritten and rearranged under different letters in the translation and appears as "Table Analytique." The tables of contents and of decisions cited are retained but are shifted from the beginning to the end of the volume in the translation.

CHARLES NOBLE GREGORY.

Les Conventions Internationales relatives à la compétence judiciaire et à l'Exécution des jugements. Paris: A. Pillet. 1913. pp. x, 401.

In the present volume the eminent Professor of the Faculty of Law of Paris treats of four international conventions now in force relating to the jurisdiction of courts, and to the enforcement of foreign judgments: The Franco-Italian treaty of March 24, 1760; the Franco-Baden treaty of April 16, 1846; the Franco-Swiss treaty of June 15, 1869; and the Franco-Belgian treaty of July 8, 1899. The object of the author in this

work is professedly a practical one and no attempt is made to establish a general theory with respect to the subject-matter in hand. Although the work appeals therefore primarily to the legal profession of the countries concerned, it contains also a lesson of great importance to all interested in the subject of private international law, which should serve as a warning to those who believe in international agreements as a panacea for the removal of all difficulties in the application of laws between the nations of the world. In view of the limited scope of the treaties and the extremely favorable conditions attending their conclusion, it would seem that their object should have been attainable with comparative ease. Concluded between countries whose private law rests substantially on the Code Napoléon, and whose basic principles in the conflict of laws governing the subject-matter under consideration are identical, Professor Pillet nevertheless has to admit that these treaties have not come up to the expectation entertained at the time of their making. "Instead of inaugurating among the peoples the reign of law," the learned author says, "we have ended by encumbering the archives of our courts with innumerable briefs. What better example of this fact could be cited than the treaty of 1869 concerning which, on many points, after forty years of constant application, we still ask what is its meaning, or again the treaty of 1899, which the very day after it went into effect showed enormous discordances and gave rise to controversies without end." Notwithstanding the disappointing result of these treaties, the illustrious professor does not suggest an abandonment of the attempt to reach an agreement in the conflict of laws by international conventions; he merely wishes to insist upon the fact that all progress in this direction will, in the nature of things, be very slow and be brought about only if the contracting parties have the same thoughts and intentions and succeed in expressing them in clearer and more concise language.

Viewed from the standpoint from which this work was written, it is admirably done. Under each treaty the author considers in detail its scope, both as to subject-matter and as to the persons who can invoke the treaty, and its relation to the common law of the countries concerned. The principles upon which the treaties are based and the qualifications and exceptions thereto are set forth with great clearness. In conformity with the practical aim in view, the author discusses under each treaty the adjudications by the courts of the contracting countries. Each decision is submitted to a critical examination which invariably

throws a flood of light upon the problem involved. Nor does Professor Pillet confine himself to a consideration of the questions actually raised or suggested by the adjudicated cases. On every hand he makes inquiries concerning the application of the ordinary rules of private international law with a view of determining whether an extensive interpretation should be given to the rule laid down in the treaty, or a limitation should be placed upon its apparent scope. The text of the treaties, the protocole drawn up by the plenipotentiaries who signed the Franco-Swiss treaty, and the message of the Federal Council of Switzerland to the High Federal Assembly concerning the Franco-Swiss treaty, are found in an appendix.

On account of the fundamental differences existing in the Continental and Anglo-American law with respect to the subject-matter of the treaties, little need be said concerning the actual content and nature of the problems raised by them. A general statement concerning the Franco-Swiss and the Franco-Belgian treaties, which are by far the most important ones of the treaties under discussion, must suffice. Both in the matter of jurisdiction and in the enforcement of foreign judgments they maintain the characteristic Continental point of view. The jurisdiction of the courts in personal causes of action is not left to the accident where personal service is made, but is fixed by law (domicile of the defendant, *lex loci contractus*, etc.). Personal service or submission to the jurisdiction of the court, on the other hand, is not insisted upon; it is sufficient if the defendant was duly cited before the court so as to have had an opportunity to defend the action.

In the enforcement of foreign judgments also radically different notions exist in the two systems of law. Under our law foreign judgments (including those of sister States) are never enforceable as such. Execution will issue only with respect to domestic judgments. Hence the necessity of a new suit and judgment based upon the foreign judgment before execution will lie. On the Continent a judgment constitutes no new cause of action. Foreign judgments, if enforceable at all, are enforceable as such. Execution, however, will issue only after an exequatur has been obtained from the proper tribunal. The conditions upon which a foreign judgment will be declared executory differ widely. The French courts, for example, will, in the absence of treaty, re-examine the merits of the foreign judgment before granting the exequatur. See Cassation, June 28, 1881 (Sirey, 1882, 1, 33); Cass. Feb. 9, 1892 (Sirey, 1892, 1, 201); Cass. Dec. 9, 1903 (Dalloz, 1906, 1, 354). Such re-

examination is excluded, however, by the treaties under consideration.

There are numerous and vital differences between the Franco-Swiss and the Franco-Belgian treaties. Only one of them need be noticed here. The Franco-Swiss treaty lays down common rules of jurisdiction for both countries, so that the same rule will govern, whether the suit is brought in the one country or in the other. The Franco-Belgian treaty, on the other hand, assimilates the subjects of the contracting parties juridically so that in the matter of jurisdiction the local law of each country, applicable to the subjects of such state, is applied also to the subjects of the other state. One rule may therefore govern the cases brought in the French courts and another rule those brought in the Belgian courts. Professor Pillet prefers the method adopted by the Franco-Swiss treaty, for the reason that the laying down of common rules carries out as far as possible the idea of equality and avoids unforeseen circumstances in the application of the treaty.

E. G. LORENZEN.

Aéronefs sanitaires et conventions de la Croix-Rouge. By Ch.-L. Julliot. Paris: A. Pedone. 1913. pp. 110.

The value of this brochure to the publicist is its objective completeness. M. Julliot devotes at least four-fifths of his space to the conditions confronted by the sanitary corps on the modern battlefield and the possibility of securing improvement by the employment of aircraft to find and to transport the wounded to central stations. He has not gone with any thoroughness into the legal problems involved in making the sanitary service three-dimensional, but has conscientiously sought out the practical difficulties of such a change and has offered at least a partial solution of them. Considering the thoroughness of his objective study, it is regrettable that he did not take the time to draft a project meeting the conditions to be realized in his opinion, and which might form the basis of examination by interested bodies.

M. Julliot has himself made several efforts to secure the adaptation of the Red Cross conventions to permit of the employment of aircraft, but the average reader will readily agree with the opinion that such adaptation is premature, an opinion officially expressed by the bureau of international unions of the French Ministry of Foreign Affairs in reply to a request for the convocation of a conference on the subject. Yet,

though action is not possible at present, it is essential that the problem and its elements be understood, and such understanding M. Julliot's pages renders easy.

Even the best of sanitary arrangements are inadequate in modern warfare. The battlefield is no longer restricted and the conflict no longer short. When the lines stretch over heterogeneous country for thirty or forty miles and the troops are in action for days, even weeks, at a time, humanitarian feeling is staggered at the suffering and loss of life the mere conditions entail. Hundreds of wounded must lie for days without attention, many must die for want of aid. Corpses clutter up the trenches and, putrefying, tend to breed disease. The battle line of trenches advances or retards and the nests of wounded once near enough to their comrades for aid to be summoned are marooned in a sea of death to die by degrees because the sanitary service cannot find them. M. Julliot recites these conditions with a wealth of evidence, and submits that aircraft operating from above would reduce the inhumanity of the conditions to a minimum. But, granting that aircraft are to be employed, it is obvious that the enemy would be permitting the almost perfect survey of his military operations in the interest of humanity. Quite as obviously such a situation will not be allowed. How, then, are sanitary aircraft to work? On examination, the existing Red Cross conventions are found to offer insufficient guaranty and insufficient protection, and new conventions are therefore necessary to realize the purpose in mind. It should be interesting to admirers of the work of Paul Fauchille that M. Julliot does not materially go beyond what that talented French publicist wrote on the subject in 1899 in the *Revue générale de droit international public*. M. Fauchille's proposal, somewhat amended, is as follows:

> Considering that it is of the highest importance that search for the wounded in war on the field of battle should be conducted by means of sanitary avions; but, considering that sanitary avions manned by a personnel of belligerent nationality could not proceed with this search while enjoying the immunities of the Geneva convention on account of the indiscretions which, from a legitimate patriotic sentiment, their machines inevitably would commit on the forces and strategic positions of the enemy surprised by them; considering that it is not possible to employ sanitary avions manned by a personnel of neutral nationality for finding wounded, states not being constrained to furnish a sanitary personnel in a war to which they are not parties; considering that it is desirable to approach for a work of this nature an organization independent both of belligerent and neutral states; considering that this organization can be none other than the International Committee of the Red Cross, the object of

which is to aid by the means in its power the assistance of wounded soldiers without distinction of nationality.

"And for these reasons," says M. Julliot, "M. Fauchille asks that the International Committee of the Red Cross be invited in time of peace, and with the pecuniary aid of the various states and the Red Cross societies of the different countries, to constitute squadrons of sanitary avions, carrying the Red Cross flag and piloted by persons belonging to all nationalities, which it could place in case of war at the disposition of belligerents."

Such is the conclusion that M. Julliot accepts as his own. It seems to be a logical solution of the problem he set himself to solve.

DENYS P. MYERS.

Justicia Internacional Positiva. By Dr. E. S. Zeballos. Valencia and Madrid: F. Semper y Compañia. 1911. pp. 225.

These ten lectures of the distinguished Argentine statesman and publicist, Dr. Estanislao S. Zeballos, on "Positive International Justice" were delivered in his course on Private International Law, or, as he calls it, "Private Human Law," at the Faculty of Law and Social Sciences of the University of Buenos Aires in 1910. They are valuable from several points of view,—chiefly as an exposition of the author's views on the subject of "Private Human Law," which he considers as a most important topic for study in Argentina, owing to the many problems connected with immigration, commerce, property rights and civil liberty which are constantly occurring in that new and rapidly developing republic.

Dr. Zeballos considers that the study of "Private Human Law" indicates the desire of states to regulate their foreign affairs by rules of law. He then carefully traces the progress of arbitration in the world at large, with especial reference to America, both North and South, and the applications of the principle of arbitration to the development of "Private Human Law," which he considers may be regarded from four distinct points of view,—the rights of persons, the rights of things, the rights of judicial acts and the execution of foreign judgments. He considers Story's *Conflict of Laws* as the first work which organically and scientifically embraced these various phases of his topic. The influence of South America, and especially of Argentina, on the development of "Private Human Law" is treated in great detail, and much

valuable information is brought out, with especial reference to the Convention of Lima of 1878 and that of the jurists at Montevideo in 1889, and the work of the celebrated Uruguayan jurisconsult, Dr. Gonzalo Ramirez, toward codifying "Private Human Law."

CHARLES LYON CHANDLER.

Grotius Internationaal Jaarboek voor 1913. s'Gravenhage: Martinus Nijhoff. 1913. pp. iv, 434.

This useful little book, edited by Messrs. van der Flier, de Jong van Beek en Donk, van der Mandere, and ter Meulen, is the first volume of an International Yearbook which is henceforth to be published annually. There has been a distinct demand for such a publication and the present volume is intended to furnish Dutch readers with information concerning the international activities of the year. It is, of course, in the nature of an experiment—as every new attempt of this sort must be—and there is, no doubt, much room for improvement in future editions. It does not, however, pretend to compete with the monumental *Jahrbuch des Völkerrechts* edited by Niemeyer and Strupp.[1] But the mere fact that the book saw the light in Holland, the home of the great international jurist whose name appears on the title-page, is in itself significant. For it would seem to indicate an increased interest on the part of the Dutch in international law, and a realization that their country—as the seat of the Hague court—may perhaps be assigned a rôle whose moral influence in the council of states might be far greater than either its size or strength would warrant.

A glance at the table of contents will give an idea of what the editors proposed to do. There is, first of all, a short article on the life and work of the late General den Beer Poortugael, the eminent Dutch soldier and scholar whose writings on the laws of war and enthusiastic advocacy of disarmament had won for him an international reputation. Then (pp. 19–53) follows an article on the "Development of the Community of States" ("Statengemeenschap") contributed by Jacob ter Meulen, and one entitled "The Press as an Apostle of Peace" by Dr. Kuyper. A brief survey of the world politics of the year 1912 and of the international relations of the Netherlands practically concludes the Dutch portion of the book. The remaining and most useful part (beginning p. 99) is, with the exception of an account of the international con-

[1] Reviewed in this JOURNAL, Vol. 8, p. 180.

gresses held in the Netherlands in 1913, composed of documents which are either in French or English and can therefore be readily consulted by everybody. We have here the text of the convention of 1912 concerning the unification of the laws governing bills of exchange, with an introduction by the late T. M. C. Asser, and of the opium convention signed January, 1912, at The Hague. A bibliography of public international law for the year 1912 (pp. 157–165), while not exhaustive, is valuable because it includes a number of doctors' dissertations not easily found elsewhere. A bibliography of private international law is promised in a future edition. A very welcome feature of the book will doubtless be the collection of the official texts of the decisions which have so far been rendered by the Hague Tribunal (pp. 246–386). The need for a convenient place where these decisions could be consulted has long been felt. A list of all present and former members of the Permanent Court of Arbitration is also included. The last two sections of the Annual contain, respectively, the texts of the arbitration treaties signed by the Netherlands, and a list of international organizations whose headquarters are in the Netherlands. It seems a pity that the absence of an index—still so frequent in foreign publications—should have been allowed to impair the usefulness also of this reference book.

A. VAN H. ENGERT.

The Panama Canal Conflict between Great Britain and the United States of America: A Study. By L. Oppenheim, M. A., LL.D., Whewell Professor of International Law in the University of Cambridge. Cambridge: University Press. 1913. pp. 57.

The Panama Canal Controversy: A Lecture Delivered before the University of Oxford on October 25, 1913. By Sir H. Erle Richards, K. C., K. C. S. I., B. C. L., M. A., Chichele Professor of International Law and Diplomacy, and Fellow of All Souls College. Oxford: The Clarendon Press. 1913. pp. 48.

These two brochures by distinguished professors of international law at Cambridge and Oxford set forth very clearly and concisely what is usually spoken of as the British view of the Panama Canal controversy,—a view which, however, it should be remembered, is also held by a large number, if not a majority, of American authorities on international law. Both writers claim that the expression "all nations" in Article III, Rule 1, of the Hay-Pauncefore Treaty includes the United States, and that therefore that part of the Panama Canal Act of Au-

gust 24, 1912, which exempts American ships engaged in the coastwise trade from the payment of dues is a plain violation of the treaty. Sir H. E. Richards' argument is essentially historical in character, going back to the negotiations attending the Clayton-Bulwer Treaty, and showing clearly that the United States had always stood for the principle of equal treatment, and could have had nothing less in mind when the Hay-Pauncefote Treaty was negotiated to take the place of the earlier convention. To show that there was no change in the status of things when the United States became the "practical sovereign" of the Canal Zone, he quotes Article XVIII of the Hay-Varilla Treaty between the United States and Panama, signed in 1903. This article reads as follows: "The Canal when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by section 1 of Article III of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18th, 1901."

Turning to Professor Oppenheim's study we find it remarkable for its clear analysis, close reasoning, and comprehensive brevity—qualities which secured such prompt recognition of the permanent value of his great work on international law. After stating President Taft's position, which, he says, was in substance that the United States has granted the use of *her* canal to foreign nations under a conditional most-favored-nation clause, he sums up the historical facts under five heads: (1) that in 1850 Great Britain and the United States by the Clayton-Bulwer Treaty agreed that the Canal should be neutralized and that it should be open to the vessels of all nations under conditions of equality; (2) that in 1901 the two parties to the Clayton-Bulwer Treaty agreed to substitute for it the Hay-Pauncefote Treaty, which stipulated that the Canal might be constructed under the auspices of the Government of the United States, and that the said Government, subject to the provisions of Articles III and IV, should have the exclusive right of providing for the regulation and management of the Canal; (3) that the United States agreed to adopt as the basis of the neutralization of the Canal certain rules, substantially the same as those embodied in the Suez Canal convention of 1888; (4) that the parties agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the Canal should affect the general principle of neutralization or the obligation of the parties under the Hay-Pauncefote Treaty; and (5) that when in 1903 the United States

by the Hay-Varilla Treaty acquired from the Republic of Panama the Canal Zone, she acquired sovereign rights over this Zone and the Canal subject to the antecedent restrictions imposed upon her by the Hay-Pauncefote Treaty.

Advancing from these premises, the historical accuracy of which it would be difficult to challenge, he moves forward to his conclusions with such clear and simple logic that they seem inevitable.

He then passes on from the general principles governing the case to a discussion of the exemption of coastwise vessels from the payment of tolls. He points out the fact that the United States uses the term "coasting trade" in a very broad and unusual sense, ignoring the distinction made by other nations between coasting trade and colonial trade. In this connection he says:

> The unheard-of extension by the United States of the meaning of the term coasting trade would allow an American vessel sailing from New York to the Hawaiian Islands, but touching at the ports of Mexico or of a South American State, after having passed the Panama Canal, to be considered as engaged in the coasting trade of the United States. Being exempt from paying the Canal tolls she could carry goods from New York to the Mexican and South American ports concerned at cheaper rates than foreign vessels plying between New York and these Mexican and South American ports. There is, therefore, no doubt that in such cases the exemption of American coasting trade vessels from the tolls would involve a discrimination against foreign vessels in favour of vessels of the United States.

He draws a sharp distinction between the refunding of the tolls and exemption from the payment of tolls. Since other nations would be free under the Hay-Pauncefote Treaty to grant a subsidy to their vessels by refunding to them the amount of the tolls collected at Panama, he admits that no valid objection could be made to the United States doing the same thing. He calls special attention to the fact that when the first draft of the Hay-Pauncefote Treaty was before the Senate, Senator Bard of California moved as an amendment that the United States should reserve the right to discriminate in the matter of charges in favor of the vessels of her own citizens engaged in the American coasting trade, but this amendment was rejected by 43 to 27 votes. This is a fact which has not often been alluded to in recent discussions of the question, and it is of importance as illustrating the position of the United States at the time the Hay-Pauncefote Treaty was negotiated.

Professor Oppenheim's discussion of the relations between international law and municipal law is illuminating and to the point. He

holds that they are two essentially different bodies of law, but he calls attention to the fact that the American courts have laid down two maxims regarding the relationship of the two, namely, first, that *international law overrules previous municipal law*, and, secondly, that *municipal law overrules previous international law*. He deduces, therefore, the conclusion that the courts of the United States could not pass upon the question as to whether the Panama Canal Act was in violation of the Hay-Pauncefote Treaty, because if it should be shown to be an infringement of the treaty, the court would have to hold that the part of the treaty with which it conflicted was repealed by the subsequent Act of Congress. With reference to the submission of the question to an international court of arbitration, he calls attention to the fact that the British-Amercian Arbitration Treaty expressly reserves all disputes which "concern the interests of third parties." If, he claims, the word "interests" is used in a general sense of "advantages," there is no doubt that the question concerns the interests of third parties, but if the word "interests" means "rights," it can hardly be said that the interests of third parties are concerned in the dispute, for the Hay-Pauncefote Treaty is one to which only Great Britain and the United States are contracting parties, but, he concludes, that after all it is a matter of minor importance whether the United States is *compelled* by the British-American Arbitration Treaty to submit the dispute to arbitration, for, he says, "even if she be not compelled to do so, it must nevertheless be expected that she will do so. If any dispute is, by its very character, fit and destined to be settled by arbitration, it is this dispute, which is clearly of a legal nature and at the same time one which concerns the interpretation of treaties."

In one connection Professor Oppenheim raises a question which, if his interpretation be correct, may yet lead to serious complications with England even though the tolls question be amicably settled. He claims that the whole of Article III of the Hay-Pauncefote Treaty, Rules 2–6 as well as Rule 1, is as fully binding on the United States as on any other Power. In other words, he claims that the Hay-Pauncefote Treaty really secures the neutralization which the treaty professes to uphold in principle. It may be seriously questioned whether the effective neutralization of the Canal contemplated in the Clayton-Bulwer Treaty was not virtually abandoned when the Hay-Pauncefote Treaty substituted the sole guarantee of the United States for the collective guarantee of the great world Powers contemplated in the former treaty. The United

States has decided to fortify the Canal, and it would appear that Great Britain has acquiesced in our right to do so. While no one will question the ability of the United States to guarantee the neutrality of the Canal in any war to which the United States itself is not a party, it seems unlikely that the United States would consent in a war in which it was engaged to permit the other belligerent to use the Canal under any circumstances. In fact, with the Canal fortified and used as a naval base, it would become the legitimate object of attack on the part of the other belligerent, and the United States would of course make every effort to defend it. While the present reviewer has expressed himself strongly as opposed to the policy of fortification, he regards that question largely as one of expediency so long as England raises no objection, and England apparently has consented. In view, therefore, of the attitude of England, we do not believe that Professor Oppenheim is correct when he states that "the United States, even if she herself were a belligerent, has no more rights in the use of the Canal than her opponent or a neutral power; on the contrary she is as much bound as these powers to submit to the rules of Article III, Nos. 2–6, of the Hay-Pauncefote Treaty."

JOHN H. LATANÉ.

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[For Table of abbreviations see Chronicle of International Events, p. 361]

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SUPPLEMENT—IMPORTANT TEXTS OF AN INTERNATIONAL CHARACTER

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THE REAL MONROE DOCTRINE [1]

I ask your attention for a few minutes to some observations upon the Monroe Doctrine. If I am justified in taking your time it will be not because I say anything novel, but because there is occasion for restating well settled matters which seem to have been overlooked in some recent writings on the subject.

We are all familiar with President Monroe's famous message of December 2, 1823.

> The occasion has been judged proper for asserting as a principle in which the rights and interests of the United States are involved, that the American Continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European Powers. * * *
>
> * * * * * * * *
>
> In the wars of the European Powers in matters relating to themselves we have never taken any part, nor does it comport with our policy to do so. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are of necessity more immediately connected and by causes which must be obvious to all enlightened and impartial observers.
>
> We owe it, therefore, to candor, and to the amicable relations existing between the United States and those Powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European Power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner, their destiny, by any European Power, in any other light than as the manifestation of an unfriendly disposition toward the United States. In the war between these new governments and Spain we declared our neutrality at the time of their

[1] Opening Address by Elihu Root, as President of the American Society of International Law, at the Eighth Annual Meeting of the Society, in Washington, April 22, 1914.

recognition, and to this we have adhered and shall continue to adhere, provided no change shall occur which, in the judgment of the competent authorities of this government, shall make a corresponding change on the part of the United States indispensable to their security. * * *

It is impossible that the allied Powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can any one believe that our southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition, in any form, with indifference.

The occasion for these declarations is a familiar story—The revolt of the Spanish provinces in America which Spain, unaided, was plainly unable to reduce to their former condition of dependence; the reaction against liberalism in Europe which followed the downfall of Napoleon and the restoration of the Bourbons to the throne of France; the formation of the Holy Alliance; the agreement of its members at the Conferences of Aix la Chapelle and Laybach and Verona for the insurance of monarchy against revolution; the restoration of Ferdinand the Seventh to the throne of Spain by the armed power of France pursuant to this agreement; the purpose of the Alliance to follow the restoration of monarchy in Spain by the restoration of that monarchy's control over its colonies in the New World; the claims both of Russia and of Great Britain to rights of colonization on the Northwest coast; the proposals of Mr. Canning to Richard Rush for a joint declaration of principles by England and the United States adverse to the interference of any other European Power in the contest between Spain and her former colonies; the serious question raised by this proposal as to the effect of a joint declaration upon the American policy of avoiding entangling alliances.

The form and phrasing of President Monroe's message were adapted to meet these conditions. The statements made were intended to carry specific information to the members of the Holy Alliance that an attempt by any of them to coerce the new states of South America would be not a simple expedition against weak and disunited colonies, but the much more difficult and expensive task of dealing with the formidable maritime power of the United States as well as the opposition of England, and they were intended to carry to Russia and incidentally to England the idea that rights to territory in the New World must thenceforth rest

upon then existing titles, and that the United States would dispute any attempt to create rights to territory by future occupation.

It is undoubtedly true that the specific occasions for the declaration of Monroe no longer exist. The Holy Alliance long ago disappeared. The nations of Europe no longer contemplate the vindication of monarchical principles in the territory of the New World. France, the most active of the Allies, is herself a republic. No nation longer asserts the right of colonization in America. The general establishment of diplomatic relations between the Powers of Europe and the American republics, if not already universal, became so when, pursuant to the formal assent of the Powers, all the American republics were received into the Second Conference at The Hague and joined in the conventions there made, upon the footing of equal sovereignty, entitled to have their territory and independence respected under that law of nations which formerly existed for Europe alone.

The declaration, however, did more than deal with the specific occasion which called it forth. It was intended to declare a general principle for the future, and this is plain not merely from the generality of the terms used but from the discussions out of which they arose and from the understanding of the men who took part in the making and of their successors.

When Jefferson was consulted by President Monroe before the message was sent he replied:

> The question presented by the letters you have sent me is the most momentous which has ever been offered to my contemplation since that of independence. That made us a nation; this sets our compass and points the course which we are to steer through the ocean of time opening on us. And never could we embark upon it under circumstances more auspicious. Our first and fundamental maxim should be, never to entangle ourselves in the broils of Europe; our second, never to suffer Europe to intermeddle with cisatlantic affairs.

Three years later Daniel Webster declared that the doctrine involved the honor of the country. He said in the House of Representatives:

> I look upon it as a part of its treasures of reputation; and, for one, I intend to guard it. * * * I will neither help to erase it or tear it out; nor shall it be, by any act of mine, blurred or blotted. It did honor to the sagacity of the government, and will not diminish that honor.

Mr. Cleveland said in his message of December 17, 1895.

> The doctrine upon which we stand is strong and sound because its enforcement is important to our peace and safety as a nation, and is essential to the integrity of our free institutions and the tranquil maintenance of our distinctive form of government. It was intended to apply to every stage of our national life and cannot become obsolete while our republic endures.

As the particular occasions which called it forth have slipped back into history, the declaration itself, instead of being handed over to the historian, has grown continually a more vital and insistent rule of conduct for each succeeding generation of Americans. Never for a moment have the responsible and instructed statesmen in charge of the foreign affairs of the United States failed to consider themselves bound to insist upon its policy. Never once has the public opinion of the people of the United States failed to support every just application of it as new occasion has arisen. Almost every President and Secretary of State has restated the doctrine with vigor and emphasis in the discussion of the diplomatic affairs of his day. The governments of Europe have gradually come to realize that the existence of the policy which Monroe declared is a stubborn and continuing fact to be recognized in their controversies with American countries. We have seen Spain, France, England, Germany, with admirable good sense and good temper, explaining beforehand to the United States that they intended no permanent occupation of territory, in the controversy with Mexico forty years after the declaration, and in the controversy with Venezuela eighty years after. In 1903 the Duke of Devonshire declared "Great Britain accepts the Monroe Doctrine unreservedly." Mr. Hay coupled the Monroe Doctrine and the Golden Rule as cardinal guides of American diplomacy. Twice within very recent years the whole treaty-making power of the United States has given its formal approval to the policy by the reservations in the signature and in the ratification of the arbitration conventions of The Hague Conferences, expressed in these words by the Senate resolution agreeing to ratification of the convention of 1907:

> Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political

questions of policy or internal administration of any foreign state, nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of its traditional attitude towards purely American questions.

It seems fair to assume that a policy with such a history as this has some continuing and substantial reason underlying it; that it is not outworn or meaningless or a purely formal relic of the past, and it seems worth while to consider carefully what the doctrine is and what it is not.

No one ever pretended that Mr. Monroe was declaring a rule of international law or that the doctrine which he declared has become international law. It is a declaration of the United States that certain acts would be injurious to the peace and safety of the United States and that the United States would regard them as unfriendly. The declaration does not say what the course of the United States will be in case such acts are done. That is left to be determined in each particular instance. Mr. Calhoun said, in the Senate debate on the Yucatan Bill, in 1848:

Whether you will resist or not and the measure of your resistance—whether it shall be by negotiation, remonstrance, or some intermediate measure, or by a resort to arms; all this must be determined and decided on the merits of the question itself. This is the only wise course. * * * There are cases of interposition where I would resort to the hazard of war with all its calamities. Am I asked for one? I will answer. I designate the case of Cuba.

In particular instances indeed the course which the United States would follow has been very distinctly declared, as when Mr. Seward said, in 1865:

It has been the President's purpose that France should be respectfully informed upon two points; namely, first, that the United States earnestly desire to continue and to cultivate sincere friendship with France. Secondly, that this policy would be brought in imminent jeopardy unless France could deem it consistent with her honor to desist from the prosecution of armed intervention in Mexico to overthrow the domestic republican government existing there and to establish upon its ruins the foreign monarchy which has been attempted to be inaugurated in the capital of that country.

So Secretary Buchanan said, in 1848:

The highest and first duty of every independent nation is to provide for its own safety; and acting upon this principle, we should be compelled

to resist the acquisition of Cuba by any powerful maritime state, with all means which Providence has placed at our command.

And Secretary Clayton said, in 1849:

The news of the cession of Cuba to any foreign Power would in the United States be the instant signal for war. No foreign Power would attempt to take it that did not expect a hostile collision with us as an inevitable consequence.

The doctrine is not international law but it rests upon the right of self-protection and that right is recognized by international law. The right is a necessary corollary of independent sovereignty. It is well understood that the exercise of the right of self-protection may and frequently does extend in its effect beyond the limits of the territorial jurisdiction of the state exercising it. The strongest example probably would be the mobilization of an army by another Power immediately across the frontier. Every act done by the other Power may be within its own territory. Yet the country threatened by the state of facts is justified in protecting itself by immediate war. The most common exercise of the right of self-protection outside of a state's own territory and in time of peace is the interposition of objection to the occupation of territory, of points of strategic military or maritime advantage, or to indirect accomplishment of this effect by dynastic arrangement. For example, the objection of England in 1911 to the occupation of a naval station by Germany on the Atlantic coast of Morocco; the objection of the European Powers generally to the vast force of Russia extending its territory to the Mediterranean; the revision of the Treaty of San Stefano by the Treaty of Berlin; the establishment of buffer states; the objection to the succession of a German prince to the throne of Spain; the many forms of the eastern question; the centuries of struggle to preserve the balance of power in Europe; all depend upon the very same principle which underlies the Monroe Doctrine; that is to say, upon the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself. Of course each state must judge for itself when a threatened act will create such a situation. If any state objects to a threatened act and the reasonableness of its objection is not assented to, the efficacy of the objection will depend upon the power behind it.

It is doubtless true that in the adherence of the American people to the original declaration there was a great element of sentiment and of sympathy for the people of South America who were struggling for freedom, and it has been a source of great satisfaction to the United States that the course which it took in 1823 concurrently with the action of Great Britain played so great a part in assuring the right of self-government to the countries of South America. Yet it is to be observed that in reference to the South American governments, as in all other respects, the international right upon which the declaration expressly rests is not sentiment or sympathy or a claim to dictate what kind of government any other country shall have, but the safety of the United States. It is because the new governments cannot be overthrown by the allied Powers "without endangering our peace and happiness;" that "the United States cannot behold such interposition in any form with indifference."

We frequently see statements that the doctrine has been changed or enlarged; that there is a new or different doctrine since Monroe's time. They are mistaken. There has been no change. One apparent extension of the statement of Monroe was made by President Polk in his messages of 1845 and 1848, when he included the acquisition of territory by a European Power through cession as dangerous to the safety of the United States. It was really but stating a corollary to the doctrine of 1823 and asserting the same right of self-protection against the other American states as well as against Europe.

This corollary has been so long and uniformly agreed to by the Government and the people of the United States that it may fairly be regarded as being now a part of the doctrine.

But, all assertions to the contrary notwithstanding, there has been no other change or enlargement of the Monroe Doctrine since it was first promulgated. It must be remembered that not everything said or written by Secretaries of State or even by Presidents constitutes a national policy or can enlarge or modify or diminish a national policy.

It is the substance of the thing to which the nation holds and that is and always has been that the safety of the United States demands that American territory shall remain American.

The Monroe Doctrine does not assert or imply or involve any right

on the part of the United States to impair or control the independent sovereignty of any American state. In the lives of nations as of individuals, there are many rights unquestioned and universally conceded. The assertion of any particular right must be considered, not as excluding all others but as coincident with all others which are not inconsistent. The fundamental principle of international law is the principle of independent sovereignty. Upon that all other rules of international law rest. That is the chief and necessary protection of the weak against the power of the strong. Observance of that is the necessary condition to the peace and order of the civilized world. By the declaration of that principle the common judgment of civilization awards to the smallest and weakest state the liberty to control its own affairs without interference from any other Power, however great.

The Monroe Doctrine does not infringe upon that right. It asserts the right. The declaration of Monroe was that the rights and interests of the United States were involved in maintaining a condition, and the condition to be maintained was the independence of all the American countries. It is "the free and independent condition which they have assumed and maintained" which is declared to render them not subject to future colonization. It is "the governments who have declared their independence and maintained it and whose independence we have on great consideration and on just principles acknowledged" that are not to be interfered with. When Mr. Canning's proposals for a joint declaration were under consideration by the Cabinet in the month before the famous message was sent, John Quincy Adams, who played the major part in forming the policy, declared the basis of it in these words:

> Considering the South Americans as independent nations, they themselves and no other nation had the right to dispose of their condition. We have no right to dispose of them either alone or in conjunction with other nations. Neither have any other nations the right of disposing of them without their consent.

In the most critical and momentous application of the doctrine Mr. Seward wrote to the French Minister:

> France need not for a moment delay her promised withdrawal of military forces from Mexico and her putting the principle of non-intervention into full and complete practice in regard to Mexico through any

apprehension that the United States will prove unfaithful to the principles and policy in that respect which on their behalf it has been my duty to maintain in this now very lengthened correspondence. The practice of this government from its beginning is a guarantee to all nations of the respect of the American people for the free sovereignty of the people in every other state. We received the instruction from Washington. We applied it sternly in our early intercourse even with France. The same principle and practice have been uniformly inculcated by all our statesmen, interpreted by all our jurists, maintained by all our Congresses, and acquiesced in without practical dissent on all occasions by the American people. It is in reality the chief element of foreign intercourse in our history.

In his message to Congress of December 3, 1906, President Roosevelt said:

In many parts of South America there has been much misunderstanding of the attitude and purposes of the United States toward the other American republics. An idea had become prevalent that our assertion of the Monroe Doctrine implied or carried with it an assumption of superiority and of a right to exercise some kind of protectorate over the countries to whose territory that doctrine applies. Nothing could be farther from the truth.

He quoted the words of the Secretary of State then in office to the recent Pan-American Conference at Rio Janeiro:

We deem the independence and equal rights of the smallest and weakest member of the family of nations entitled to as much respect as those of the greatest empire and we deem the observance of that respect the chief guaranty of the weak against the oppression of the strong. We neither claim nor desire any rights or privileges or powers that we do not freely concede to every American republic.

And the President then proceeded to say of these statements:

They have my hearty approval, as I am sure they will have yours, and I cannot be wrong in the conviction that they correctly represent the sentiments of the whole American people. I cannot better characterize the true attitude of the United States in its assertion of the Monroe Doctrine than in the words of the distinguished former Minister of Foreign Affairs of Argentina, Doctor Drago * * * "the traditional policy of the United States without accentuating superiority or seeking preponderance condemned the oppression of the nations of this part of the world and the control of their destinies by the great Powers of Europe."

Curiously enough, many incidents and consequences of that independent condition itself which the United States asserted in the Monroe Doctrine have been regarded in some quarters as infringements upon independence resulting from the Monroe Doctrine. Just as the personal rights of each individual free citizen in the state are limited by the equal rights of every other free individual in the same state, so the sovereign rights of each independent state are limited by the equal sovereign rights of every other independent state. These limitations are not impairments of independent sovereignty. They are the necessary conditions to the existence of independent sovereignty. If the Monroe Doctrine had never been declared or thought of, the sovereign rights of each American republic would have been limited by the equal sovereign rights of every other American republic, including the United States. The United States would have had a right to demand from every other American state observance of treaty obligations and of the rules of international law. It would have had the right to insist upon due protection for the lives and property of its citizens within the territory of every other American state, and upon the treatment of its citizens in that territory according to the rules of international law. The United States would have had the right as against every other American state to object to acts which the United States might deem injurious to its peace and safety just as it had the right to object to such acts as against any European Power and just as all European and American Powers have the right to object to such acts as against each other. All these rights which the United States would have had as against other American states it has now. They are not in the slightest degree affected by the Monroe Doctrine. They exist now just as they would have existed if there had been no Monroe Doctrine. They are neither greater nor less because of that doctrine. They are not rights of superiority, they are rights of equality. They are the rights which all equal independent states have as against each other. And they cover the whole range of peace and war.

It happens, however, that the United States is very much bigger and more powerful than most of the other American republics. And when a very great and powerful state makes demands upon a very small and weak state it is difficult to avoid a feeling that there is an assumption

of superior authority involved in the assertion of superior power, even though the demand be based solely upon the right of equal against equal. An examination of the various controversies which the United States has had with other American Powers will disclose the fact that in every case the rights asserted were rights not of superiority but of equality. Of course it cannot be claimed that great and powerful states shall forego their just rights against smaller and less powerful states. The responsibilities of sovereignty attach to the weak as well as to the strong, and a claim to exemption from those responsibilities would imply not equality but inferiority. The most that can be said concerning a question between a powerful state and a weak one is that the great state ought to be especially considerate and gentle in the assertion and maintenance of its position; ought always to base its acts not upon a superiority of force, but upon reason and law; and ought to assert no rights against a small state because of its weakness which it would not assert against a great state notwithstanding its power. But in all this the Monroe Doctrine is not concerned at all.

The scope of the doctrine is strictly limited. It concerns itself only with the occupation of territory in the New World to the subversion or exclusion of a pre-existing American government. It has not otherwise any relation to the affairs of either American or European states. In good conduct or bad, observance of rights or violations of them, agreement or controversy, injury or reprisal, coercion or war, the United States finds no warrant in the Monroe Doctrine for interference. So Secretary Cass wrote, in 1858:

> With respect to the causes of war between Spain and Mexico, the United States have no concern, and do not undertake to judge them. Nor do they claim to interpose in any hostilities which may take place. Their policy of observation and interference is limited to the permanent subjugation of any portion of the territory of Mexico, or of any other American state, to any European Power whatever.

So Mr. Seward wrote, in 1861, concerning the allied operation against Mexico:

> As the undersigned has heretofore had the honor to inform each of the plenipotentiaries now addressed, the President does not feel at liberty to question, and does not question, that the sovereigns represented have undoubted right to decide for themselves the fact whether they have

sustained grievances, and to resort to war against Mexico for the redress thereof, and have a right also to levy the war severally or jointly.

So when Germany, Great Britain and Italy united to compel by naval force a response to their demands on the part of Venezuela and the German Government advised the United States that it proposed to take coercive measures to enforce its claims for damages and for money against Venezuela, adding, "We declare especially that under no circumstances do we consider in our proceedings the acquisition or permanent occupation of Venezulean territory," Mr. Hay replied that the Government of the United States, although it

> regretted that European Powers should use force against Central and South American countries, could not object to their taking steps to obtain redress for injuries suffered by their subjects, provided that no acquisition of territory was contemplated.

Quite independently of the Monroe Doctrine, however, there is a rule of conduct among nations under which each nation is deemed bound to render the good offices of friendship to the others when they are in trouble. The rule has been crystallized in the provisions of The Hague Convention for the Pacific Settlement of International Disputes. Under the head of "The Maintenance of General Peace" in that convention substantially all the Powers of the world have agreed:

> With a view to obviating as far as possible recourse to force in the relations between states, the contracting Powers agree to use their best efforts to ensure the pacific settlement of international differences.
>
> In case of serious disagreement or dispute, before an appeal to arms, the contracting Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.
>
> Independently of this recourse, the contracting Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the states at variance. * * * The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.
>
> The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the states at variance.

The United States has frequently performed this duty in controversies between American republics among themselves and between American

republics and European states. So in the controversy last referred to, the United States used its good offices to bring about a series of arbitrations which superseded the resort to force determined upon by the allied Powers against Venezuela. She did this upon the request of Venezuela. She did it in the performance of no duty and the exercise of no right whatever except the duty and the right of friendship between equal sovereign states. The Monroe Doctrine has nothing whatever to do with acts of this description; yet many times censorious critics, unfamiliar with the facts and uninstructed in the customs and rules of action of the international world, have accused the United States in such cases of playing the role of school master, of assuming the superiority of guardianship, of aiming at a protectorate.

As the Monroe Doctrine neither asserts nor involves any right of control by the United States over any American nation, it imposes upon the United States no duty towards European Powers to exercise such a control. It does not call upon the United States to collect debts or coerce conduct or redress wrongs or revenge injuries. If matters ever came to a point where in any American country the United States intervenes by force to prevent or end an occupation of territory to the subversion or exclusion of an American government, doubtless new rights and obligations will arise as a result of the acts done in the course of the intervention. Unless such a situation shall have arisen there can be no duty on the part of the United States beyond the exercise of good offices as between equal and independent nations.

There are indeed special reasons why the United States should perform that duty of equal friendship to the full limit of international custom and international ethics as declared in The Hague Convention, whenever occasion arises in controversy between American and European Powers. There is a motive for that in the special sympathy and friendship for the gradually developing republics of the south which the American people have always felt since the days of Monroe and John Quincy Adams and Richard Rush and Henry Clay. There is a motive in the strong desire of our government that no controversy between a European and an American state shall ever come to the point where the United States may be obliged to assert by force the rule of national safety declared by Monroe. And there is a motive in the proper desire of the United States

that no friendly nation of Europe or America shall be injured or hindered in the prosecution of its rights in any way or to any extent that can possibly be avoided because that nation respects the rule of safety which Mr. Monroe declared and we maintain. None of these reasons for the exercise of the good offices of equality justifies nor do all of them together justify the United States in infringing upon the independence or ignoring the equal rights of the smallest American state.

Nor has the United States ever in any instance during the period of almost a century which has elapsed, made the Monroe Doctrine or the motives which lead us to support it, the ground or excuse for overstepping the limits which the rights of equal sovereignty set between equal sovereign states.

Since the Monroe Doctrine is a declaration based upon this nation's right of self-protection, it cannot be transmuted into a joint or common declaration by American states or any number of them. If Chile or Argentina or Brazil were to contribute the weight of her influence toward a similar end, the right upon which that nation would rest its declaration would be its own safety, not the safety of the United States. Chile would declare what was necessary for the safety of Chile. Argentina would declare what was necessary for the safety of Argentina. Brazil, what was necessary for the safety of Brazil. Each nation would act for itself and in its own right and it would be impossible to go beyond that except by more or less offensive and defensive alliances. Of course such alliances are not to be considered.

It is plain that the building of the Panama Canal greatly accentuates the practical necessity of the Monroe Doctrine as it applies to all the territory surrounding the Caribbean or near the Bay of Panama. The plainest lessons of history and the universal judgment of all responsible students of the subject concur in teaching that the potential command of the route to and from the Canal must rest with the United States and that the vital interests of the nation forbid that such command shall pass into other hands. Certainly no nation which has acquiesced in the British occupation of Egypt will dispute this proposition. Undoubtedly as one passes to the south and the distance from the Caribbean increases, the necessity of maintaining the rule of Monroe becomes less immediate and apparent. But who is competent to draw the line? Who will say,

"To this point the rule of Monroe should apply; beyond this point, it should not"? Who will say that a new national force created beyond any line that he can draw will stay beyond it and will not in the long course of time extend itself indefinitely?

The danger to be apprehended from the immediate proximity of hostile forces was not the sole consideration leading to the declaration. The need to separate the influences determining the development and relation of states in the New World from the influences operating in Europe played an even greater part. The familiar paragraphs of Washington's Farewell Address upon this subject were not rhetoric. They were intensely practical rules of conduct for the future guidance of the country.

> Europe has a set of primary interests, which to us have none, or a very remote relation. Hence, she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities. Our detached and distant situation invites and enables us to pursue a different course.

It was the same instinct which led Jefferson, in the letter to Monroe already quoted, to say:

> Our first and fundamental maxim should be, never to entangle ourselves in the broils of Europe; our second, never to suffer Europe to intermeddle with cisatlantic affairs.

The concurrence of Washington and Hamilton and Jefferson in the declaration of this principle of action entitles it to great respect. They recalled the long period during which every war waged in Europe between European Powers and arising from European causes of quarrel was waged also in the New World. English and French and Spanish and Dutch killed and harried each other in America, not because of quarrels between the settlers in America but because of quarrels between the European Powers having dominion over them. Separation of influences as absolute and complete as possible was the remedy which the wisest of Americans agreed upon. It was one of the primary purposes of Monroe's declaration to insist upon this separation, and to accomplish it he drew the line at the water's edge. The problem of national pro-

tection in the distant future is one not to be solved by the first impressions of the casual observer, but only by profound study of the forces which, in the long life of nations, work out results. In this case the results of such a study by the best men of the formative period of the United States are supported by the instincts of the American democracy holding steadily in one direction for almost a century. The problem has not changed essentially. If the declaration of Monroe was right when the message was sent, it is right now. South America is no more distant today than it was then. The tremendous armaments and international jealousies of Europe afford little assurance to those who think we may now abandon the separatist policy of Washington. That South American states have become too strong for colonization or occupation is cause for satisfaction. That Europe has no purpose or wish to colonize American territory is most gratifying. These facts may make it improbable that it will be necessary to apply the Monroe Doctrine in the southern parts of South America; but they furnish no reason whatever for retracting or denying or abandoning a declaration of public policy, just and reasonable when it was made, and which, if occasion for its application shall arise in the future, will still be just and reasonable.

A false conception of what the Monroe Doctrine is, of what it demands and what it justifies, of its scope and of its limits, has invaded the public press and affected public opinion within the past few years. Grandiose schemes of national expansion invoke the Monroe Doctrine. Interested motives to compel Central or South American countries to do or refrain from doing something by which individual Americans may profit invoke the Monroe Doctrine. Clamors for national glory from minds too shallow to grasp at the same time a sense of national duty invoke the Monroe Doctrine. The intolerance which demands that control over the conduct and the opinions of other peoples which is the essence of tyranny invokes the Monroe Doctrine. Thoughtless people who see no difference between lawful right and physical power assume that the Monroe Doctrine is a warrant for interference in the internal affairs of all weaker nations in the New World. Against this supposititious doctrine, many protests both in the United States and in South America have been made, and justly made. To the real Monroe Doctrine these protests have no application.

ELIHU ROOT.

The building of the Panama Canal has not been a one man's work by any means. In its inception, the preparation of the field, the elimination of impossible routes, and in the actual construction work, it has drawn forth some of the best brains of the country.

Noted engineers from civil life have had an important influence in determining the locality best suited for the purpose, and also in the plans adopted for building the canal; and the names of these men will go down in history as a part of its constructive force. But as the principal object of building the canal was to augment means for the national defence, it was eminently proper that the Army and Navy of the United States should have paramount influence in its establishment. For nearly forty years naval men have been engaged in surveying different parts of Central America and the Isthmus of Panama to find a practical route which should offer the fewest obstacles in cutting a channel between the two oceans. Finally, by a process of elimination, which brought the problem to a choice between the Nicaragua and Panama routes, the construction of a canal was actually begun by an American company on the Nicaragua line, and the work of construction put in the charge of naval officers.

Owing to circumstances not necessary to mention here, this scheme was abandoned, and the Panama route, which had been first surveyed by Captain E. P. Lull, U. S. N., was finally decided upon. After many vicissitudes in starting the work, which had been begun with Admiral John G. Walker, U. S. N., as President of the Commission, the matter was turned over to the Engineer Corps of the United States Army, and it is now, as we all know, being brought to a successful ending. This was most fortunate; but for the engineering skill and military training of Colonel Goethals, as well as the remarkable sanitation work of Dr. Gorgas, U. S. Army, the canal could never have been finished within the time set. Scarcely less important to the work of constructing the canal,

than that of these great leaders has been the work accomplished by Lieut. Col. H. F. Hodges, U. S. A., Lieut. Col. D. D. Gaillard, U. S. A., Lieut. Col. William L. Sibert, U. S. A., Civil Engineer H. H. Rosseau, U. S. N., and Hon. Maurice H. Thatcher, Civil Governor of the Canal Zone, all of whom are members of the Isthmian Canal Commission, in charge of the canal construction.

It should be remembered that the canal is constructed upon land belonging to an alien government. While the United States has now been granted "all the rights, power and authority" over the "Canal Zone, which it would possess and exercise if it were the sovereign of the territory" for the purpose of constructing the canal, yet there were many questions to consider of an international character before this suzerain power became ours.

The treaties entered into between the United States and Great Britain, and the United States and the Republic of Colombia, in relation to the canal, have been productive of many difficulties and disputes; and our people who have gone along the even tenor of their ways have known but little of what has been taking place on the Isthmus of Panama or of the many questions forced upon the men who have had to carry into effect the obligations of these treaties.

Panama has been for the western world what Constantinople is for Europe,—the seat of its principal diplomatic efforts to secure peace, and a source of never ceasing contention between states. Many questions of international jurisprudence have arisen for discussion since the Panama railroad was built by an American company in 1854; and to meet these questions of divided control between the countries having interests there granted by the treaties, the Navy of the United States has been constantly called upon to act. How this has been accomplished, I shall attempt here to relate.

Lord Salisbury once said that "international law depended generally on the prejudices of the writers of text books;" however that may be, the best that can be said of this branch of jurisprudence is, that the rules relating to the same are not so well ascertainable as are those of a scientifically codified system of law, and that branch of the subject that has to deal with the enforcement of remedies is quite deficient in postulates of a character to insure consistent action by those who are

charged with the dispensation of legal justice. If it is difficult to reach a justifiable decision on such matters of international law as ordinarily arise between nations, how much harder is the task when questions come up between the United States and such countries as Colombia, where the people may be said to have lived on a diet of revolutions. In the case of naval officers who have to handle such matters, in a location far away from the executive authority responsible for the policy of the government, deprived frequently of the means of communication with the home office by the very elements that call for their jurisdiction, the task is extremely difficult. The government is always loath to render decision on possible situations in advance, lest a slight change in conditions should render their decisions nugatory; and the result is that orders from the home government to the naval officer are usually restricted to the brief mandate "Protect American interests, we rely upon your judgment."

This necessity to meet questions of international law and render decisions at once, without time for the mature consideration of diplomatic usage, has brought into use a form of jurisprudence sometimes called "Diplomacy of the quarter deck," and its administration generally falls to the lot of the naval man. The warrant for such judicial action is so universally recognized, that in the older countries of the world, men who hold commissions as officers in the Navy, are entitled to seats on the platform of the judge in any court of the realm where they may happen to be present. Although this is not the case in America, the officers as a rule have greater responsibility, as far as the foreign relations of the state is concerned, than do those of any other country. American officers may be advised by the regular diplomatic agents abroad, but such agents cannot direct them what course to take, as is the case in foreign services. They are responsible for their acts directly to the commander-in-chief, the President, through the heads of their own executive department.

Reference to what is known as the "Barrundia affair," which took place in Central America a few years ago, illustrates this fact. Here the commander of a United States war vessel was relieved of his command by the Department, for action that was taken under the advice of the American Minister, but which did not meet with the approval of the official head in his own branch of the service.

Such courts of jurisprudence as are established on ships of war are of as long standing as the country, and they have been in operation since the foundation of the Navy. "Quarter deck diplomacy" was called for as early as 1800, only a few months after suitable ships has been constructed by the government to protect American interests, when Commodore Bainbridge, commanding the Mediterranean squadron wrote: "I hope I may never again be sent to Algiers with tribute, unless I am authorized to deliver it at the mouth of our cannon." And soon after authority for such action as he requested was granted, the Navy of the United States brought all the Barbary states to terms, and broke up a nefarious custom to which foreign nations had submitted for years and which in its practice had been the disgrace of civilization.

Another example of naval jurisprudence, which owing to its importance became an international episode, was the case of Martin Koszta, an American citizen, who was kidnapped in a Turkish port by an Austrian ship of war. Through the "energetic and prompt measures," as writes the President of the United States in his message to Congress, "of Commander Ingraham of the U. S. sloop-of-war *St. Louis*, Martin Koszta was released." Here is a recital of these "energetic and prompt measures": Commander Ingraham had exhausted every possible measure to induce the Austrian commander to deliver the prisoner to him; failing in this he went to quarters, and, although the Austrian vessel was of superior force to the *St. Louis*, with batteries loaded and port fires burning, gave the Austrian the alternative of yielding to his demand, or being sunk by the guns of the *St. Louis*. The prisoner was speedily delivered to Ingraham. The diplomatic correspondence which followed this affair went on for years between our government and Austria, without reaching any definite conclusion, but this bit of quarter deck diplomacy resulting in the possession of the man,—which is nine points of the law,—the remaining point did not have much weight.

No diplomacy has ever taken place that had such marked benefit to the country and to the world as that engaged in by Commodore Mathew C. Perry when he introduced Japan into the councils of nations, or that of Admiral Shufeldt of the Navy in opening the gates of the hermit nation of Korea to the commerce of the world.

To the names of these brilliant naval officers may be added a long

list of quarter deck diplomats who had dealings with Colombia while engaged for half a century in guarding the transit of the Isthmus of Panama.

Following this general statement regarding the genesis of the "Diplomacy of the quarter deck," I shall endeavor to show some of its operations at Panama, in relation to the treaty entered into between the United States and New Granada, now the Republic of Colombia.

Political History of the Canal Zone

No thorough understanding of the serious task undertaken by the United States under the treaty with New Granada can be had without some knowledge of that country's history. I shall present a brief outline of it.

When New Granada, Venezuela and Quito (now Equador) freed themselves from the Spanish yoke in 1819, the Republic of Colombia was composed of the three provinces mentioned, New Granada comprising the colonies corresponding with Colombia of today. The two Isthmian provinces of Panama and Veraguas, did not declare their independence of the home government until two years later, November 28, 1821, when they allied themselves voluntarily with New Granada. Dissatisfaction with the conditions which followed this federation grew rapidly among the Isthmian people, and when the republic broke up into three parts in 1830, Venezuela, Ecuador and New Granada becoming separate and independent states, the Panamans called for their independence from the Bogota Government, and advocated annexation to England, if necessary, to break up the alliance which had existed with New Granada. Out of deference to the wishes of General Bolivar, who had delivered the country from monarchical control, it was finally decided that the Isthmus should remain a part of the Granadian Confederation. This was done in spite of the fact that a large portion of the people were opposed to this arrangement.

From 1830 to 1840 political conditions in New Granada grew from bad to worse, and on November 18, 1840, a revolution broke out at Panama, which resulted in the Isthmian provinces gaining their independence from the parent state. The State of Panama was then formed, and for two years it was governed by its own laws. At the same time the province of

Cartagena declared its independence, when the Bogota Government, alarmed at the result of its own evil doings, sent the popular General Thomas C. de Mosquera to the Isthmus, who induced the return of the provinces to the Granadian Confederation by making many promises of reform. Having once reëstablished the union however, all the promises of Mosquera were practically repudiated, and a new constitution was proclaimed in 1843, which changed the name from the State of New Granada to the Republic of New Granada, and reintroduced the evils of the centralized government at Bogota.

For the next twelve years, which covered a period of almost continual civil wars, Panama struggled for freedom, and at last in 1855, the Congress at Bogota was induced to amend the constitution of 1853 by establishing a federal system, and erecting, as the constitution reads, "the territory which comprises the Isthmus of Panama, to wit, Panama Azuero, Veraguas and Chiriqui, into a sovereign federal state, integral part of New Granada, under the name of the State of Panama." Thus the Republic of Panama of today, which is composed of the above named provinces, was made an autonomous state, but the right of self-government was never accorded in practice.

In 1854 the Panama railroad was built, and from that time forward, the chronicle of disturbances on the Isthmus is a part of the history of the American Navy, which was called upon to guard the transit from ocean to ocean, and no small part of the work of its officers related to the solution of the diplomatic problems which constantly arose under the treaty of 1846. To the records of the Navy Department, therefore, we must look for a clear understanding of the matter which does not exist in the records of the State Department. It should be remembered that there was no cable communication between the United States and South America until about 1880, and as questions of moment involving great interests would arise which must be settled at once, without the possibility of reference to the home government, one can readily understand the necessity for the brief, but comprehensive order from the home government to our officers, "Protect American interests." Decisions on such matters as arose had to be rendered in strict accordance with international law, and in this way naval officers have become experts in jurisprudence of an international character. It is only necessary to refer

to a few of the many cases where judicial decisions rendered, were followed in quick succession by naval action, to show the relationship of Isthmian transit to the treaties.

Under the treaty of 1846, three specific points stand out clear and distinct:

First. That "the Government of New Granada guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the Government and citizens of the United States."

Second. In return "the United States guarantee, positively and efficaciously, to New Granada, * * * the perfect neutrality of the before-mentioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed," * * * and

Third. "In consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory."

REVOLUTION OF 1856

In September 1856, soon after the Isthmian railroad was completed, an affair occurred at Panama which called into operation the "quarter deck diplomacy" of Commodore William Mervine, commanding the United States Pacific squadron. The Governor of the State had issued a decree assessing a tonnage tax on one of the Pacific Mail steamers, flying the American flag in the port, which was contrary to the treaty. The Commodore wrote the Honorable Secretary of the Navy at Washington regarding this affair, under date of September 18, 1856, as follows:

I had an interview with Governor Fabriga on the subject, and after adverting to his departure from the assurances given to me on the 1st inst., I expressed my surprise that immediately after suspending the execution of the decrees in relation to the mail of the 2nd instant, in its transit over the Isthmus, he should attempt to enforce that part referring to the tonnage tax. His reply was that the transit of the mail was a national affair, but that the tonnage tax concerned individuals only. This subtle distinction was maintained with great pertinacity, and after citing the exemptions from every species of taxation—national, provincial, and municipal—secured by treaty and other solemn compacts, without

effect, and being fully persuaded that nothing I could bring to bear would have any influence in inducing him to relinquish the prospect of an enormous income from such a fruitful source of revenue, I resorted to the use of a more potent agent which had the desired effect, and caused him to modify his tone very quickly.

I said to him emphatically that the Government of New Granada might be assured, that the Government of the United States would not quietly acquiesce in, or submit to, such a violation and flagrant outrage of their rights; and, furthermore, that if another attempt was made to survey United States vessels or to enforce the collection of a tonnage tax, that I would view it in the light of a hostile and belligerent attack upon the vested rights of the citizens of the United States, and I would meet it accordingly in the same spirit.

The Commodore's "potent" action was approved and Mr. Marcy, the Secretary of State, so notified our Minister at Bogota.

On September 19, following, a serious disturbance arose in the legislature of the State of Panama, in which one of its members was slightly wounded. Both of the political parties which divided the state rushed immediately to arms, the "Black" party retiring outside the walls of the city.

"In the apprehension of a night attack on the twentieth," writes the Commodore, "I solicited from the governor permission, which was granted, to station some men at the railroad depot and office. A communication to the same effect was addressed to me by the governor. It and my reply are herein enclosed." The reply was as follows: [1]

U. S. FLAGSHIP INDEPENDENCE,
Bay of Panama,
September 20, 1856.

Sir: I have the honor to acknowledge the receipt of your communication of the 19th instant.

In reply to your request that a portion of my forces "should be stationed at the railroad depot to act in concert with the government in maintaining order," I will state that I shall station a portion of my forces at the railroad depot and at other points for the protection of American citizens and all foreigners and their property, but that I cannot in any manner interfere with any domestic affairs, or in anything pertaining to the civil government. I have the honor to be Sir,

Very respectfully,
Your obedient servant
WILLIAM MERVINE
Commanding, United States Pacific Squadron.

SEÑOR DON FRANCO. FABRIGA
Governor of the State of Panama.

[1] Naval Correspondence, Report of the Secretary of the Navy.

In this diplomatic request of the American commodore, asking permission of the New Granadian Government to land troops for the protection of American interests, the sovereignty of that state was fully recognized; but at the same time it was made clear that the United States would in no manner attempt to maintain that sovereignty as between different political parties.

REVOLUTION OF 1860

Upon the breaking out of another insurrection at Panama, in 1860, a delicate international question arose, which brought into play a bit of diplomacy of the quarter deck type, on the part of Commander W. D. Porter, U. S. N., commanding the U. S. S. *St. Marys*, which is worthy of note. At this time the Colombian Government was, as usual, unable to guarantee free transit across the Isthmus, and the *intendente* of Panama wrote to Captain Porter as follows: under date of September 29, 1860: [2]

I have therefore come to the determination to avail myself of the kind and friendly offers of service which you, Sir, and Captain Miller, of H. M. S. *Clio*, have made to me, and to request you to land, jointly, from your ships a body of about 100 men, to be stationed in the town.

This communication, and the action of the British officer in the case, was referred to the Secretary of the Navy by Captain Porter in a letter reading as follows: [3]

Captain Miller stated to me when I met him, that he came on shore to take charge of the town with Her Britannic Majesty's forces. I informed him that on that point the United States Government was particularly jealous of the interference of any foreign Power in occupying alone any part of the continent, and that he must withdraw his forces until invited on shore by the "intendente" and Governor of the state, and that invitation and request must include the forces under my command. The "intendente" stated to me, in the presence of the Consul of the United States, and of Lieutenant Commander Boyle, that Captain Miller of the *Clio* had landed without his request or authority or order.

After peace had been established on the Isthmus, Captain Porter withdrew his men, and in acknowledging the Governor's request to do so, took occasion to mark a lesson in these words:

I will here remark that the Government of the United States is jealous of the interference of any European Power on any part of the American

[2] Naval Correspondence, Report of the Secretary of the Navy. [3] *Ibid.*

continent, and especially so with this particular route, and as the United States does not pursue an aggressive policy, it will not tolerate it in any other Power.

It would have taken months or years even of the ordinary diplomatic correspondence to accomplish what this forceful "quarter deck diplomat" did in a few moments of effectual action.

In 1858, the federal system was extended throughout the whole of New Granada, now called the Granadine Confederation, and at once dissensions arose between the several States, which continued for years. The Bogota Government became so oppressive that in the following year the States of Cauca, Bolivar, Santander, Boyaca, and Magdalena, the whole of the country, in fact, with the exception of a comparatively small section located around the capital, revolted; and under the leadership of General Mosquera, a most popular leader, leagued themselves into a confederation with the title of the United States of New Granada, and finally overthrew the Bogota Government. This bloody revolution was carried on mainly outside the limits of the Isthmus, and Panama was not affected materially by the results. The Governor of Panama, however, considering this change in the government as affording a good opportunity for the State to act for itself, issued a proclamation advising the final and complete separation of the Isthmus from the Granadine Confederation; but owing to the popularity of General Mosquera, and to his promises that Panama should become the capital of the new federation, or its metropolis at least, the State of Panama was induced to remain as a member of the United States of New Granada, as it was now called. A treaty to this effect was concluded at Colon, on September 6, 1861. This treaty reads:

ART. I.—The sovereign of the State of Panama incorporates itself into the new national entity called the United States of New Granada, and consequently becomes one of the sovereign federal States composing the aforesaid confederation, etc.

ART. II.—But the State, in use of its sovereignty, reserves the right to approve or disapprove the new compact, and the constitution, that gives expression to it, if, in its judgment, the principles established in the treaty of Carthagena of September 10, supplemented by the present one, are violated to the detriment of the autonomy of the States, or if the neutrality granted the Isthmus by the treaty with the United States of North America, in case of international war, is not recognized in case

of domestic struggles, civil wars, or revolts which may arise in the rest of the United States.

This treaty being signed, the name of the country was changed to the United States of Colombia on September 20, 1861. By this convention, Panama's connection with the Confederation was indeed "a loose tie of federal relationship."

In 1862, Mosquera's revolution came to a triumphant end, but before that result had been accomplished, several attempts were made to commit the Government of the United States, under its guarantee of the sovereignty of Colombia, but the naval commanders at the seat of the disturbance usually met and decided these questions under the usual formula—to "protect American interests" as a basis.

REVOLUTION OF 1865

On the 9th of March, 1865, another revolution took place in Panama. This was notable for the fact that it brought out an interesting correspondence relating to the construction of the treaty of 1846, which has an important bearing today on the situation in the much disturbed country of Colombia. The American Minister at Bogota forwarded a demand from the President of Colombia to Rear Admiral George F. Pearson, commanding the United States naval forces on the Pacific station, then at Panama, a copy of which was also sent to the United States consul at the port, who at the time happened to be Commander H. R. Davenport, U. S. N. (appointed to the duty by the commander-in-chief, upon the decease of the regular appointee), to the effect that "the United States should fulfill what he considers their duty by preventing a hostile party or individuals from landing within the limits of that State, and employing the necessary force to expel such, in case a landing should be effected," etc.

Both naval officers took exception to the construction placed upon the treaty by the President of Colombia and the American Minister, Commander Davenport, the acting consul, in his reply, stating:

As I do not by any means agree with either of you as to the duty of naval officers to use force to prevent one party from a hostile attempt against the other, particularly as the normal condition of this state

seems to be revolutionary, I have asked Mr. Seward for an expression of the views of the government, and its construction of the obligations devolving upon us, under said article.

Admiral Pearson's letter was still more to the point, and I give it practically in full, as follows: [4]

UNITED STATES FLAGSHIP LANCASTER
Panama Bay, *September 26, 1865.*

Sir:

I am honored by your communication (No. 2) of August 31, 1865, stating that the President of Colombia had advised you that a body of armed men, whom he characterized as bandits, had recently sailed from the port of Buenaventura in the State of Cuaca, for the purpose of invading and making war against the State of Panama, and expressing his hope that the United States would fulfill what he considers their duty, by preventing this, or any other hostile party, or individuals from landing within that state.

Article 35 of the existing treaty between New Granada, now the United States of Colombia, and the United States, guarantees to the former the perfect neutrality of the Isthmus, with the view that the free transit from one sea to the other may not be interrupted or embarrassed, etc. This, in my opinion, contains the whole gist of the requirements of the United States—not to the State of Panama, but to the United States of Colombia. Consequently, should the free transit from one sea to the other be endangered, then, and then only, is the commander of the United States naval forces in the Bay of Panama to land an armed force to carry out in good faith the terms of the treaty as expressed in Article 35 of said treaty. Should an armed force from without the limits of the United States of Colombia land at either end of said transit with a view to preventing the running of the railroad, or should any force whatever assail such road or the transit of passengers thereon, then the United States naval force here would prevent any such molestation to the utmost extent of its power, and would support and sustain the authorities of Panama in the free transit of passengers from one sea to the other.

The force under my command has nothing to do with the insignificant force to which you refer as being about to invade Panama from another State of the United States of Colombia—unless the said force interrupt the free transit of the railroad from one sea to the other; nor has the force under my command any authority to prevent the passage from one place to another of a Peruvian vessel, with or without passengers, while Peru is at peace with the United States, unless the said passengers land, and molest the railroad, when, of course, I shall attack them at once.

I look upon the view in the thirty-fifth article of the treaty as the key to the whole article, "with the view that the free transit from one sea to the other may not be interrupted." These comprehensive words are explicit and in my opinion convey to every officer of the United States at Panama precisely the course to be pursued by him.

[4] Diplomatic Correspondence—Department of State—Enclosure in letter No. 199, Mr. Burton to Mr. Seward, November 5, 1865.

As we differ materially in our construction of the thirty-fifth article of the treaty, I shall forward forthwith a copy of your official letter, with a copy of this response, to the Navy Department, in order to be informed if I am wrong in the matter. I have the honor to be most respectfully your obedient servant.

G. F. PEARSON
Acting Rear Admiral, Commanding Pacific Squadron.

HON. ALLEN A. BURTON,
Minister Resident of the United States,
Bogota, United States of Colombia.

The verdict of the Secretary of State on this correspondence was as follows: [5]

DEPARTMENT OF STATE
Washington, *November 9, 1865.*

Sir:

The question which has recently arisen under the thirty-fifth article of the treaty with New Granada, as to the obligation of this government to comply with a requisition of the President of the United States of Colombia for a force to protect the Isthmus of Panama from an invasion by a body of insurgents of that country has been submitted to the consideration of the Attorney General. His opinion is, that neither the text nor the spirit of the stipulation in that article, by which the United States engages to preserve the neutrality of the Isthmus of Panama, imposes an obligation on this government to comply with a requisition like that referred to. The purpose of the stipulation was to guarantee against seizure or invasion by a foreign Power only. It could not have been contemplated that we were to become a party to any civil war in that country by defending the Isthmus against another party. As it may be presumed, however, that our object in entering into such a stipulation was to secure the freedom of the transit across the Isthmus, if that freedom should be endangered or obstructed, the employment of force on our part to prevent this would be a question of grave expediency to be determined by circumstances. The Department is not yet aware that there is yet occasion for a decision upon this point.

I am, Sir, etc.,

WILLIAM H. SEWARD.

HON. ALLEN A. BURTON,
Minister Resident of the United States,
Bogota, United States of Colombia.

Under date of October 3, 1866, Mr. Burton, Minister at Bogota, reported to Mr. Seward in Washington, as follows: [6]

The interpretation that had prevailed here imposed grave duties on us, and since being notified of the opinion of the Attorney General I have

[5] Diplomatic Correspondence, Department of State, 1865, Letter 134, Mr. Seward to Mr. Burton.

[6] Diplomatic Correspondence, Department of State, 1866.

conceived it to be my duty to seek a declaration from President Mosquera's administration * * * which, if successful, would avoid any doubt which might arise in the future as to the duties intended to be imposed by the treaty. * * * The result has been that the Colombian Government declares that it does not feel itself authorized by the treaty to require the aid of the United States for the suppression of an insurrection, rebellion, or other disturbance on the Isthmus on the part of the Colombian citizens, not even an invasion by another Colombian State, unless such movement be intended to detach the State of Panama from the Colombian Union and annex it to a foreign Power.

This would seem to leave the Isthmus free to declare itself independent of the United States of Colombia, without the fear of forced intervention of the United States of America, provided such declaration be not accompanied in the end by annexation to a foreign Power.

It will be seen from the above correspondence that the interpretation first given to the treaty between the United States of America and the United States of Colombia [formerly New Granada] by Rear Admiral Pearson of the Navy, September 26, 1865, was now confirmed by both governments, and that at the present day it is one of the "traditions of American policy" on which the Government of the United States relies for justifications for its action in relation to the independence of Panama in 1903.

REVOLUTION OF 1873

Rear Admiral Steadman, commanding the United States Pacific squadron, upon arriving at Panama in his flagship *Pensacola*, on May 7, 1873, found hostilities going on between the opposing parties, which were contending for the possession of the government of the State of Panama, and immediately sent on shore a force of 200 sailors and marines, which took charge of the Isthmian transit and prevented the wanton destruction of property, and possibly of many lives. Many diplomatic questions arose between the Admiral and the contending forces, which, however difficult, were always settled effectively, owing to the powerful fleet he had behind him.

On September 24th of the same year another "long impending revolution" broke out at Panama, and Admiral Almy, commanding the United States Pacific squadron, landed a force of blue-jackets on the Isthmus to protect American interests. Captain A. G. Clary, commanding the *Benecia*, before the Admiral's arrival in the port, and in

anticipation of an outbreak, had applied to the Panama Government for permission to land troops, which was refused. In a letter to the Navy Department, Captain Clary writes: "I should have landed the men, ignoring this refusal, had not the Admiral arrived to relieve me as senior officer present.[7] When the disturbance actually took place, the Governor requested the Admiral to land a force, saying that "under the present circumstances he was unable to give the Panama railroad that protection and safeguard guaranteed by the treaty.[8]

The Admiral at once landed his men, as he was about to do anyway, took charge of the transit and again brought peace to the inhabitants. In writing to the Department regarding the affair, he states:

"It seems to every intelligent mind that this turmoil and danger and trouble called 'revolutions,' which has been going on for years in Panama, should have an end put to it."

During the Panama revolution of 1873, when the combined United States naval force on the Isthmus was under the command of Rear Admiral J. J. Almy, U. S. N., the United States steamer *Wyoming*, Commander W. B. Cushing, U. S. N., was stationed at Colon, under instructions from the Navy Department to remain there until relieved by another ship. Cushing had taken his full share of the responsibility of deciding cases of international law, in which he was well versed, which affected the situation at the Atlantic end of the Panama railroad, one act in particular being of such a character as to endanger his standing as an officer, to say nothing of the risk to whatever small estate he might have accumulated, should his action not be approved by the government. This was the seizure of the American steamer *General Sherman* for participation to some degree in the rebellion then going on. The warrant for such jurisdiction as Cushing assumed was based upon the neutrality laws of the United States; and an officer must be well versed in admiralty jurisprudence and legal precedence, before taking so serious a step as to break up the voyage of a ship at sea, causing a loss of thousands of dollars to the owners.

The seizure of the *General Sherman* was later upheld by the United States courts, thus relieving the commander of any liability for damages which might have accrued from a civil suit brought against him, and also

[7] Naval Correspondence, Captains' letters. [8] *Ibid.*

from such disciplinary measures as the administration then in power might have awarded him for "injudicious action."

THE VIRGINIUS AFFAIR

Although the subject has no relation to American interests at Panama, another of Commander Cushing's daring acts occurred about this time, that is such a marked example of "quarter deck diplomacy" that I venture to recite its salient features here.

While Cushing was stationed at Colon, with instructions not to leave the place until his ship had been relieved by another vessel, he received a telegram on November 8, 1873, from the American consul at Santiago de Cuba, stating that the steamer *Virginius* flying the American flag, had been captured on the high seas by the Spanish man-of-war *Tornado* on October 31st, and had been taken into the Spanish port of Santiago de Cuba, and that the captain and a number of the crew of the *Virginius* had been killed while other lives were in imminent danger. This call was enough for Cushing to disregard his orders not to leave Colon; he proceeded at full speed to the Cuban port as soon as he could complete the necessary preparations, determined to take the *Virginius* at the cost of a battle with the Spaniards, if the report should prove true.

The *Wyoming* reached Santiago at 11 A. M. on November 16th, ready for battle, but it was found the *Virginius* was not in the port. But his arrival was none too soon, as it appeared that the butchery of American citizens without warrant of law was going on with such cruel haste and such absence of humanity as to astound the world. It seemed as if General Burriel, the Governor of the port, was bent on carrying out his blood-thirsty design to murder the crew of the *Virginius* before foreign Powers could intervene or his own government could call a halt. Upon anchoring his ship in the roadstead, Cushing at once sent word to the Governor that he would like to call and pay his respects, in accordance with custom. But the Governor, with the evident intention of gaining time to carry out his nefarious plans, resorted to the proverbial Spanish tactics of delay, and attempted to put off the meeting by excuses. Whereupon Cushing sent word that if the Governor did not see him by a

specified time, or if any more of the *Virginius* crew were executed, as was threatened, he would open fire on the Governor's palace, for which purpose his ship had been anchored in a favorable position.

At the same time Commander Cushing sent a formal communication in writing to the Governor, protesting against any further execution of members of the *Virginius* crew, reciting the law in the case, and demanding an early reply. Upon the receipt of this letter an interview was promptly accorded, and the meeting between the American commander and the Spanish general was spoken of by an eye-witness as "a grand sight when he [Cushing] stood up and looked 'The Butcher' down." His piercing stare, while his hand refused to meet the outstretched hand of the Spaniard offered him, carried a wholesome dread to his opponent, and the language he used was positive, convincing and efficacious. "Sir," he said, "if you intend to shoot another one of the *Virginius* prisoners, you had best first have the women and children removed from Santiago, for I intend to take the place." That he would have done so, every act of Cushing's brilliant career gave ample proof, as the Spanish general knew full well. Not another life was taken after this interview.

The efficacy of this pointed remonstrance was the more notable from the fact that a British man-of-war and another flying the French flag were in the port at the time, each of the commanders having protested and pled in vain for the lives of their countrymen.

The only satisfaction Cushing received from Washington for his effective action was to learn that the then Secretary of the Navy had sent a telegram, as soon as he learned that the *Wyoming* was en route to Santiago de Cuba, to the commander of another cruiser at New York, in these words : "For God's sake, hurry on to Santiago de Cuba. We are afraid Cushing will do something."

Cushing did not know, as all communication from the outside world was cut off from Santiago, that mass meetings were taking place in the larger cities of the country, calling for drastic measures, such as he had already taken. Cushing acted entirely on his own responsibility; but the final arbitrator to which all such cases must be referred—the court of public opinion—of which Cushing was wont to say "the public is always good to the service, when the Navy was on the fight to redress a wrong,"

gave him the "well done, Cushing," to which he aspired and which he merited.

A Congressional committee, to which had been referred a resolution to give the thanks of Congress to the British officer referred to, for his supposed action in arresting the massacre at Santiago, reported it adversely, and, after reciting Cushing's letter to General Burriel in full, made the following statement:

> From which it appears that Captain Cushing did his duty completely and gallantly in asserting the rights of the American Government and its citizens, and upholding the honor of the American flag. * * * Your committee are pleased to have it in their power to add that no further executions took place after the reception of this letter to General Burriel.

REVOLUTION OF 1885

In 1885 a very general and extensive revolution broke out in Colombia, which called for the use of most of the ships of the North Atlantic and Pacific squadrons, and demanded the mobilization of a naval brigade of infantry and artillery, made up by depleting nearly all the navy yards of the country of their police force.

In this disturbance not only the diplomatic ability, but the military intelligence, of the officers were put to the extreme test of international usage. Admiral J. E. Jouett, U. S. N., the commander-in-chief, issued a prohibition to both parties—the government and the insurrectionists, in the following words:[9] "I do not intend to allow any arms or ammunition to be introduced into this country during this disturbance."

He writes that

> In carrying out this mandate I sent the *Galena* to Porto Bello [situated about 30 miles to the eastward of Colon and the only other harbor on the Atlantic side within a distance of fifty miles of the Canal Zone] to prevent the landing of a party consisting of about 150 persons, which had sailed from Barranquilla with the intention of landing here, and operating along the line of the Panama railroad.

The drastic measure of the American Government in calling out the reserves of the naval stations was due to the fact that the insurrectionists had burned Aspinwall [Colon] and insulted the American flag by seizing

[9] Naval Correspondence, Letter 4, Admiral Jouett to Sec. Navy, Apr. 17, 1885.

two officers of the *Galena* while on shore, and some other Americans, and confining them in prison.

This, like many other revolutions in Colombia, cost the Government of the United States a great deal of money, to say nothing of the expense due to the sickness and incidental injuries brought upon its people, for which no remuneration has ever been made. It is safe to say that Colombia has been saved an enormous amount of expense in its administration of the country by the interposition of American forces in putting down revolutions which have occurred on the Isthmus.

REVOLUTION OF 1901

In 1901 there occurred another disturbance on the Isthmus, which was notable as leading up to the great event of the "taking of the Canal Zone" by the Government of the United States under the presidency of Theodore Roosevelt, so much criticised by some American newspapers. At this time the naval force was under the command of Captain Thomas Perry, U. S. N., commanding the U. S. battleship *Iowa*. For many months he handled the conflicting claims of the revolutionists and the governmental forces at war with each other, in one of the most delicate situations that ever arose upon the Isthmus, with consummate skill and diplomatic ability.

After the reëmbarking of the American seamen who had been landed to protect the Isthmian transit, Hon. G. A. Guger, United States Consul-General at Panama, and now the Chief Justice of the Canal Zone, wrote to the Captain as follows:

> The world does not know and never will know, and therefore cannot appreciate the many difficulties you have had to meet, and the various and vexed questions, large and small, with which from time to time you have had to deal. The bearing of the men was superb, and their conduct gentlemanly. Personally, I feel proud of them.

Many of the revolutions which have taken place upon the Isthmus [some fifty-three in fifty-seven years] assumed proportions so threatening as to require extraordinary measures on the part of the United States to protect the lives not only of its own citizens but those of nearly every other country in the world. Our countrymen looked with suspicion, born of the Monroe Doctrine, on the interference of any other nation in

these "family quarrels," and so was forced to do double duty of a very delicate and intricate nature.

REVOLUTION OF 1902

In 1902, upon the breaking out of the revolution of that year, a question of great moment arose in relation to the treaty of 1846, in connection with the movement of Colombian troops that attempted to cross the Isthmus to suppress an insurrection under General Benjamin Herrera, commanding the revolutionary forces. Commander T. C. McLean, commanding the U. S. S. *Cincinnati*, and senior officer present at the time, wrote to him and to General Thomas Quintero, commanding the Colombian troops, as follows: [10]

U. S. S. CINCINNATI
Colon, Colombia,
September 23, 1902.

Dear Sir:

I have to inform you that the United States naval forces are guarding the railroad trains and the line of transit across the Isthmus of Panama from sea to sea, and that no person whatever will be allowed to obstruct, embarrass, or interfere in any manner, with the trains on the route of transit. No armed men except forces of the United States will be allowed to come on or use the line.

All this is without prejudice or any desire to interfere in domestic contentions of the Colombians.

Please acknowledge the receipt of this communication. With assurances of high esteem and consideration,

I am very respectfully,
T. C. MCLEAN,
Commander U. S. N. Commanding.

Of course a protest was made at once by the chief of the government forces to this prohibition of the passage of armed Colombian troops over the Panama railroad. But the order was enforced until the conditions on the Isthmus were such as to make it clear that armed men might traverse the road without endangering its free and uninterrupted transit. The precautionary measures taken by Captain McLean for keeping open the transit were strictly in accordance with the universal custom, as established by a long and continuous line of precedents; but it happened that the Navy Department had sent a similar order to the one issued by him

[10] Naval Correspondence, Captains' letters.

to the commander of the U. S. S. *Ranger* at Panama on September 12, 1902.

It is a notable fact that this is the first time in the history of naval diplomacy on the Isthmus of Panama, that the government had sent instructions to its officers specifically defining its policy regarding the transportation of belligerent troops over the Panama railroad.

It is also notable that they were issued in accordance with a telegraphic request from Captain Potter, dated September 2, 1902, reading "Request instructions regarding transporting government troops or revolutionists in the event of landing force for the protection of the railroad." [11]

The American forces were not landed until September 17th, but there can be no question that had it been necessary to land them before the receipt of the Department's instructions of the 12th, our proverbial policy of not allowing Colombian troops to obstruct the transit of the Isthmus would have been carried out. This instance exemplifies the fact that it is impossible to direct from Washington the operations governing a revolution at Panama, which may have been born, killed, and buried before an exchange of even telegraphic communications can be put in force.

Rear Admiral Silas Casey, U. S. N., commanding the Pacific squadron, arrived at Panama soon after this occurrence, and upon taking charge of the combined naval force, on the Atlantic and Pacific termini of the railroad reissued the order of Captain McLean as follows: [12] "No troops belonging to either belligerent will be allowed to use the railroad, or interfere with the free transit from sea to sea." After the revolutionists had left the vicinity of Panama, Admiral Casey permitted the government troops to cross the line.

While the Revolution of 1902 was going on, the State Department at Washington received from the United States Minister at Bogota, a communication stating that "The Minister for Foreign Affairs desires me to inform you that his government would appreciate your good offices to bring about peace in this country, especially on the Isthmus, where the revolution is strong." Whereupon the Acting Secretary

[11] Naval Correspondence, Captains' letters.
[12] Naval Correspondence, Admirals' letters

addressed a note to the Navy Department containing the following: [13]

I have received from the President a telegram approving my suggestion as to entrusting such a mission to the commander of the *Cincinnati*. The precedents in which our naval commanders have lent their good offices to bring about peace in Central America during the past years, will serve to guide Commander McLean in the execution of such instructions as you may deem proper to give him in this regard.

This delicate mission, first entrusted to Commander McLean, was turned over to Admiral Casey upon his arrival at Panama, and a treaty of peace between the contending forces was brought about through his instrumentality, and was signed on board his flagship, the *Wisconsin*, October 24, 1902.

It will be seen from what has since transpired that the policy already established not to allow any armed force to traverse the railroad route across the Isthmus of Panama, whether belonging to the Government of Colombia or not, was rigidly adhered to and only once, up to this time, did the Navy Department give instructions to its officers as to the policy to be pursued, and only then was it done in answer to a request for instructions. This was in the telegraphic order of September 12, 1902, to the commanding officer of the U. S. S. *Ranger* at Panama: [14]

United States guarantees perfect neutrality of Isthmus, and that transit from sea to sea be not interrupted or embarrassed. Any transportation of troops which might contravene these provisions of treaty should not be sanctioned by you, nor should use of road be permitted which might convert the line of transit into theater of hostility.

This order conforms strictly with the traditional policy of the government, and this policy would have been carried out without direct instructions from the home government whenever the necessity for action arose.

The policy of the United States Government may be summarized briefly as follows:

First. That it was the duty of Colombia to keep open the transit across the Isthmus, but in case she did not do so the United States would.

Second. That no troops belonging to political parties, whether na-

[13] Naval Correspondence, Letter of Sec. State to Sec. Navy, Sept. 16, 1902.

[14] Naval Correspondence, Captains' letters.

tional or not, could use the railroad for war purposes, if such use was likely to interfere with the "free transit from sea to sea."

Third. That the United States guaranteed the sovereignty of Colombia against foreign nations only, and would not aid in putting down internal insurrections, unless intended "to detach the state of Panama from the Colombian Union and annex it to a foreign Power."

With this brief historical account of naval diplomatic action on the Isthmus of Panama during its occupancy by the Panama railroad, we come to the final act in the drama of political turmoil of Colombia, which cost the republic its chief gem, and gave to Panama the freedom for which she had been struggling and longing for the best part of a century. To the American naval officers and others who had to bear the burden of enforcing the stipulations of the treaty of 1846 between the United States of America and the Republic of Colombia, this period has been replete with trying situations, and the change to the present conditions on the Isthmus was a welcome relief from onerous duties, and, while taking no part in the events which finally brought about "Panama Libra," they rejoiced in her success.

PANAMA INDEPENDENCE

Panama is a state with an area of 31,540 square miles, and, at the time it finally secured its independence from Colombia, had a population of 340,000 souls. It was the third in size among the countries in Central America to whose geographical zone it naturally belongs, and is nearly equal in size to any of them. It is not much smaller in fact than was the area of the thirteen original North American colonies at the time they became independent of British control. The Isthmian provinces which compose the Republic of Panama have been struggling for the better part of a century for separation from Colombia, whose guardianship had prevented their enjoyment of those means of prosperity with which they were so bountifully endowed by nature in the possession of the great highway for the carrying trade of the world.

Colombia had derived her principal revenue from Panama, which came to be known as the "milch cow" of the republic, and over and over again special assessments had been made upon her resourceful treasury

to put down the civil wars in other parts of the country brought about by the misrule of the central government of Bogota.

Panama had won her independence once before, maintaining it for a period of two years, and might have done so many times, but for the necessary interference of the United States in order to protect the Isthmian transit.

Revolution against oppression is the inalienable right of any people; otherwise there would have been no republican form of government on the American continent today. Panama claimed this right as hers, and when she made good, not only through her own efforts, but by the renunciation of allegiance on the part of the Colombian army which had been sent to keep the Panamanians in subjection, no one had a right to deny her claim to the fruits of her well won victory.

This war of revolution in Panama was long foretold, and the ultimate independence of the little republic was prophesied in many ways. The world was kept posted by the public press, and when it finally came there was a feeling of universal joy among all nations that the Isthmian State had at last secured its independence; and there was prompt recognition of the republic of Panama by foreign countries soon after the revolution had become *fait accompli*.

Naval men who were familiar with political conditions in Colombia before the establishment of the Panama republic, saw that the limited power given to the United States by the Hay-Herran treaty in the building and management of the Panama Canal, was none too much to accomplish this purpose, and that any less power granted us by the treaty would only lead to an "entangling alliance." This treaty, which was rejected by the Colombian legislature, read as follows: [15]

ART. III.—To enable the United States to exercise the rights and privileges granted by this treaty the Republic of Colombia grants to that government, the use and control for the term of one hundred years, renewable at the *sole* and absolute option of the United States, for periods of similar duration, so long as the United States may desire, of a zone of territory along the route of the canal to be constructed five kilometers in width on either side thereof, measured from its center line including therein the necessary auxiliary canals, not exceeding in any case fifteen miles from the main canal and other works, etc., etc.

[15] Diplomatic Correspondence, Department of State, Hay-Herran Treaty.

ART. IV.—The rights and privileges granted to the United States by the terms of this convention shall not affect the sovereignty of the Republic of Colombia over the territory within whose boundaries such rights and privileges are to be exercised.

The United States freely recognizes this sovereignty and disavows any intention to impair it in any way whatever or to increase its territory at the expense of Colombia or of any of the sister republics in Central or South America, but on the contrary, it desires to strengthen the power of the republics on this continent, and to promote, develop, and maintain their prosperity and independence.

It will be seen that, so far as the sovereignty of Colombia was concerned, the part of the treaty of 1846 relating to the canal was, as Mr. Hay wrote, "expressly incorporated into and perpetuated in the Hay-Herran treaty of 1903," the guarantee of Colombian sovereignty being put in stronger terms in fact than was used in the earlier treaty. The question of Colombian sovereignty was always a bone of contention between the two countries, and if it caused so much trouble, as I have endeavored to show, when North American interests on the Isthmus were comparatively small, what could have been expected when a United States canal became the dominant feature of the Isthmus? It was a matter of relief, therefore, to those who best understood the difficulties of carrying out the stipulation of the treaty, when the Colombian parliament disavowed the agreement made by the representative of their government, Mr. Herran, even if we were forced to fall back upon the Nicaragua route for a canal, as it seemed at first would become necessary.

The long expected and seemingly only possible solution of the problem soon came in Panama's declaration of independence. Officers of the Navy interested in the construction of the canal looked on the coming conflict with Panama with high hopes that this would prove to be the last war with which they would have to deal while the sovereignty of the canal zone rested in the Government at Bogota. But the President of the United States was so careful to guard against any seeming interference in the political affair of Colombia that the Navy, the "watchdog" of the Isthmian transit, was held in leash, far away from the impending strife, leaving the Isthmus of Panama for the first time in years without a guardship to protect American interests. It was not until 5 P. M., November 2, 1903, that one small cruiser the *Nashville*,

arrived at Colon to take up the duty that had usually fallen to the lot of a squadron of vessels. At the time of the arrival of the cruiser everything was seemingly quiet on the Isthmus. "There was talk of proclaiming the independence of Panama," writes Commander John Hubbard, of the *Nashville*, in his report to the Navy Department, "but no definite action has been taken, and there has been no disturbance of peace or order. At daylight on the morning of November 3rd, it was found that a vessel which had come in during the night, was the Colombian gunboat *Cartagena*, carrying between 400 and 500 troops. I had her boarded and learned that these troops were for the garrison at Panama. Inasmuch as the Independent party had not acted, and the Government of Colombia was in undisputed control of the province of Panama, I did not feel, in the absence of any instructions, that I was justified in preventing the landing of the troops, and at 8:30 they were disembarked. The Department's message, addressed to the care of the United States consul, I received at 10:30 A. M. At about 5:30 P. M. I again went on shore and learned that it had just been announced that a provisional government had been established at Panama, and that General Amaya and Tobal, the Governor of Panama, and four officers who had gone to Panama in the morning, had been seized and were held as prisoners; that they had organized a force of 1,500 troops, and wished the government troops in Colon sent over. This I declined to permit, and verbally prohibited the general superintendent from giving transportation to either party."

It will be seen from Commander Hubbard's report that until the war actually broke out between the government forces and the revolutionists, no attempt whatever was made to prevent the free action of Colombia in carrying out her intention of replacing the troops at Panama [who were suspected of being partial to the insurrectionists] by fresh men recruited from the outlying States of the republic. Commander Hubbard implies, however, that had war existed when he arrived at Colon, he would have taken the usual course of action, and prevented the landing of the government troops on the Isthmus, without waiting to receive orders from Washington. Moreover, he stated in very positive language to the writer in person, that "in accordance with the traditional policy of the United States," he would not have permitted any troops to land at

Porto Bello or any other place within fifty miles of the Panama railroad at this time, had hostilities begun.

Another notable feature of this report is that the revolutionists "wished the government troops in Colon to be sent over," and it is evident they expected to receive the same sympathy for their cause from these troops, as was given them by the Colombian army already stationed at Panama, and which had thrown in its lot with the revolutionists. That they had reason for their belief is evident from the following remarkable letter written to the Colombian Minister of War by one of Colombia's best known generals, who was the president of the Council of the capital of the Department of Cauca, the adjoining State to Panama. This letter was dated Cali, Nov. 20, 1903, about two weeks after the revolution at Panama took place,[16] and was addressed to the Minister of War at Bogota. It reads as follows:

> Your excellency asks me, in a telegram of the 16th, whether it is true that I am propagating in Cauca the idea of separation, and I am called upon to state frankly my views in this respect, and, with the characteristic frankness which your excellency acknowledges in me, I make this statement: It is true that I have written something like a dozen letters drafted on the same model as the one which was sent from Buenaventura to General Velasco, and sent by him to your excellency. * * *
>
> Since your excellency desired to know my views I have expressed them openly and frankly; in the same way it is my duty to inform your excellency that the indignation is general in Cauca in consequence of the blunders in Bogota, and that in spite of information which the government may have received to the contrary, the idea of separation is almost unanimous; to crush that opinion, not a single battalion could be organized, because the outcome would be futile, etc.

And so it appears that sympathy for the desire of the State of Panama to gain her independence was general throughout the State of Cauca, covering an area of more than half that of the entire United States of Colombia, and as all other departments bordering on the Caribbean Sea were generally at war with the Bogota Government, it is hardly likely that any support could have been obtained from them to aid in suppressing the revolution.

When the newspapers in the United States announced that the long expected revolution had actually broken out in Panama, the American

[16] Diplomatic Correspondence, Department of State, 1903.

fleet was hurried to the Isthmus to protect the transit from "disturbance or embarrassment" by either party to the conflict, and orders were sent from Washington in anticipation of the arrival of the ships at Panama and Colon, which conformed with the well established policy of the Government of the United States. A telegram from the Navy Department reads as follows: [17]

NAVY DEPARTMENT, WASHINGTON D. C.
November 3, 1903.

Nashville, Colon:

In the interest of peace make every effort to prevent government troops at Colon from proceeding to Panama. The transit of the Isthmus must be kept open and order maintained. Acknowledge.

DARLING, *Acting* (Secretary).

And on November 5th another telegram read:

Nashville, Colon:

Prevent any armed force of either side from landing at Colon, Porto Bello, or vicinity.

MOODY (Secretary of the Navy).

As has been seen from Commander Hubbard's report, the earlier of these telegrams was not received until 10:30 A. M. of the day following the arrival of the *Nashville*, after 500 Colombian troops had landed at Colon. Every naval officer who had ever performed duty on the Isthmus knew that the "traditional policy" of the United States was to prevent such action, on the part of any troops whatever, if it was likely to interfere with the free and uninterrupted transit over the railroad, but as yet no war existed which would warrant interference and no attempt was made to prevent the landing. This policy would have been carried out at once had there been occasion, without orders from Washington.

TAKING THE PANAMA CANAL

The facts regarding the celebrated "fifty mile" order issued by President Roosevelt, are as follows: The order in question read:

WASHINGTON, D. C., *November 4, 1902.*

Prevent the landing of any armed force, either government or insurgent, with hostile intent, at any point within fifty miles of Panama.

[17] Naval Correspondence, Captains' letters.

This telegram was sent to Rear Admiral Henry Glass, commanding the United States naval forces on the Pacific station, then on board the *Marblehead* at Acapulco, Mexico, some thousand miles distant from Panama, with orders to proceed to the Isthmus and take charge of the situation. Admiral Glass did not, however, reach Panama with the gunboats *Marblehead* and *Concord*, until November 10th, several days after the revolution was over and a provisional government of the Republic of Panama had been inaugurated. The U. S. S. *Boston* of the Pacific fleet received the news of the insurrection on the Isthmus at San Juan del Sud, Nicaragua, on November 4th and, proceeding at once, reached Panama on the afternoon of the 7th. This was the first war vessel of the United States to arrive at Panama on the Pacific side of the Isthmus, and consequently Captain Hubbard of the *Nashville*, at Colon, was the only United States officer present to handle the trying situation brought about by the revolution.

Let us see what he did. A force of over 500 Colombian troops had landed at Colon and taken possession of the town, before he knew there was any reason why he should take action. The troopship had reached the port within a few hours of the arrival of the *Nashville* in the harbor, and he had caused an officer to board her at six o'clock on the following morning (November 3rd), learned the object of the expedition and took no exception to the landing of the troops, which they did at 8:30 A. M. At 10:30 A. M. the Department's telegram not to allow the troops to land was received; but by that time the Colombians held possession of the place and the principal Colombian officers had gone to Panama by rail. Not until 5:30 P. M. was it known definitely that war prevailed, so that practically the Colombian force had nearly a full day to entrain, authority for which had been given, and to reach their destination at Panama. Captain Hubbard was now in an extremely difficult situation. With only about sixty men of his small crew, which could be landed to meet a force of 500 disciplined soldiers who held possession of the place, he was forced to resort to diplomacy; and his ability to do this was put to a severe test. After much discussion of the treaty rights of both parties, he practically received a promise from the Colombian senior officer to reëmbark the troops and to leave the port. At 9:30 A. M. of the following day the transport went alongside the wharf again from her

anchorage in the bay, apparently to receive the Colombian battalion. Soon after noon, however, the commander of the *Nashville* was signalled to come on shore, where he found the transport, without the troops, just about to leave the harbor, which she did at 1:30 P. M. The Colombians were now threatening to attack the railroad in spite of his protestations and prompt and drastic action was necessary. He immediately landed his small force, took possession of the railroad station, and got his vessel under way to cover the approaches, and by sheer force of nerve subdued his opponents, so that at 7:10 P. M. the *Nashville's* crew reembarked, with peace practically assured.

All this time the railroad was open to Panama, for the station occupied and barricaded by the seamen, with nearly all the foreign inhabitants of the place assembled in it, was at the sea end of the line, and there was no means of guarding the rest of the road with the small force available. It is certain that the Colombians, if at all resourceful, might have seized enough cars to transport the force to Panama, had they wished to go there. Three of their officers were prisoners (in Panama) and the insurgents had asked that the Colombian troops should be allowed to come there also; but it was evident that if this was permitted the soldiers would join the revolutionists, as that portion of the army located there had already done.

At 7:05 P. M. November 5th, the U. S. S. *Dixie* arrived at Colon with a battalion of marines on board, but the Colombian force had made arrangements to leave the port on board H. B. S. S. *Orinoco* before her arrival and the vessel steamed out of the harbor at 7:35 P. M. with the troops on board, and the revolt of the Panamans was a *fait accompli*.

For once the United States did not make use of "sweet words and a big stick" to carry out her well established policy regarding Isthmian transit, but words of diplomacy, uttered by a "quarter deck diplomat" carrying a very small stick indeed, accomplished the purpose.

The much mooted question of the responsibility of the United States in guarding the sovereignty of Colombia under the treaty of 1846, was never better expressed than in a letter from the Minister of Foreign Affairs of Colombia to the United States Minister at Bogota. This

letter was written by reason of the action of Admiral George F. Pearson, in 1865, and it has a fitting place here. It is as follows: [18]

BOGOTA, *September 14, 1866.*

* * * * * * * * * * * * * * *

As to the interposition due from the Government of the United States by the treaty existing between the two nations in the event that an insurrection by armed force should take place upon the Isthmus for the purpose of segregating it from the Union, the Government of Colombia understands that, if such a movement should be effected with the view of making that section of the Republic independent and attaching it to any other foreign nation or power,—that is to say, in order to transfer by any means whatever the sovereignty which Colombia justly possesses over that territory to any foreign nation or power whatever,—the case will then have arisen when the United States of America, in fulfilment of their obligation contracted by the thirty-fifth article of the treaty existing between the two Republics, should come to the assistance of Colombia, to maintain its sovereignty over the Isthmus, but not when the disturbances are confined to Colombian citizens.

* * * * * * * * * * * * * * *

JOSÉ M. ROJAS GARRIDO.

As to the right and duty of the United States to prevent the transportation of Colombian troops across the Isthmus of Panama, to put down a rebellion by Colombian citizens, under Article 35 of the treaty of 1846 between New Granada, now the United States of Colombia, and the United States of America, by which the United States guarantees to the former "the perfect neutrality of the Isthmus with the view that the free transit from one sea to the other may not be interrupted or embarrassed" it may be summed up in the words of Admiral Pearson in his letter of September 26, 1865, as follows: [19]

I look upon the view in the thirty-fifth article of the treaty as the key to the whole article, "with the view that the free transit from one sea to the other may not be interrupted." These comprehensive words are explicit and in my opinion convey to every officer of the United States Government at Panama precisely the course to be pursued by him.

This understanding of the obligation of the United States was confirmed by Secretary Seward, in a letter to Allen A. Burton, United States Minister to Colombia, dated October 9, 1866 in these words: [20]

[18] Diplomatic Correspondence, Department of State, Letter No. 277, Oct. 3, 1866, Exhibit F.

[19] See *ante*.

[20] Diplomatic Correspondence, Department of State, 1866.

> The United States have always abstained from any questions of internal revolution in the State of Panama, or any other of the States of the United States of Colombia, and will continue to observe a perfect neutrality in such domestic controversies. In the case, however, that the transit trade across the Isthmus should suffer from an invasion from either domestic or foreign disturbances of the peace in the State of Panama, the United States will hold themselves ready to protect the same.

This rule of action for the United States was never questioned by any constituted authority whatever, until after Panama secured her independence, and had not Commander Hubbard followed it, with or without instructions, he would have been derelict in his duty and liable to court martial.

To meet some of the fallacious arguments that have been made to demonstrate that the Government of the United States took an unfair, if not illegal, attitude against Colombia during the insurrection which brought about the independence of Panama, it may be said, in the significant words of Mr. Seward, in his letter of November 9, 1865, heretofore quoted in this article, that "It could not have been contemplated that we were to become a party to any civil war in that country by defending the Isthmus against another party," for Judge Guger, the Consul General of the United States at Panama when the insurrection took place, and the only official outside of his staff empowered to act for his government up to the time of the arrival of the *Nashville* at Colon, told me when I was on a visit to Panama in March 1912, that his office was entirely unconscious of any real trouble taking place at the time it occurred. There were, to be sure, rumors flying around of a possibility of a revolution taking place, but as this simply represented the normal condition of affairs in Colombia, where for over fifty years before an average of nearly one political disturbance had taken place annually, no particular attention was paid to the reports then rife. The Consul General himself had left the Isthmus a short time before the insurrection broke out and was in the United States on his annual leave of absence. He naturally would not have been away from his post at such a time had he expected anything of serious moment to occur during his absence.

It seems from the Consul General's statement that his deputy, his own son, who was left in charge of the office, at about noon of the eventful day, November 2, 1903, received a telegram from the Secretary of

State, asking if accounts of an uprising at Panama published in the New York papers on the morning of that date were correct. As no information relating to the affair had come to his knowledge, he proceeded to make an investigation, and meeting in the streets of Panama a friend whom he thought might know about it, he inquired and was told, in apparent confidence, that a proclamation declaring the independence of the Republic of Panama would take place at six o'clock that evening, which was done on schedule time. The Deputy Consul General sent a cable report of what he had learned to the State Department at about 4 P. M., but it was not received in Washington until 9 P. M. of the same day. This was the first real authoritative knowledge the government had of the revolution at Panama, and steps were at once taken to carry out the traditional policy in such matters.

It is undoubtedly true that private parties in New York and elsewhere did assist the revolting subjects of Colombia in their efforts to secure their independence from a government which had bled the people of Panama for years, and from which they had repeatedly attempted to secure the freedom authorized by the constitution of the country. Until open war broke out between the contending parties, and a proclamation was issued by the President of the United States calling for the neutrality of the nation in the strife, our people had as much right to extend their sympathy and send munitions of war to the revolting State of Panama, as the people of France had to do the same during the war for American independence. It could as well be said that Lafayette was debarred from enlisting in the just cause of our forefathers, as to say that M. Bunau-Varilla and his confreres, for instance, might not take up the equally just claim of the Panamanians to be free from a control that was sapping the very vitality of the state. International law and usage lends its support to this view, and the history of the country is so replete with precedents for such acts as may have been committed that no argument is needed to establish the legality of this right of a free people.

It is not necessary to recite all the events which followed the insurrection at Panama to meet the purpose of this paper. Its object will have been fulfilled if it has been shown that every act of the United States Government, relating to the "taking of Panama," was done in strict accordance with its "traditional policy," agreed to by Colombia, as well

as in accord with the law of nations; and that the Panama Canal would never have been constructed but for the prompt, energetic and *legal* action of President Roosevelt, in securing a workable contract with the Republic of Panama, making possible the practical solution of that stupendous dream of the ages—the cutting through by this narrow thread of water, of the two great continents of the western world.

COLBY M. CHESTER.

OBSERVATIONS ON THE NEW GERMAN LAW OF NATIONALITY

Among the most noteworthy phenomena of modern times are the extensive exploitation of new and thinly settled countries by citizens of countries older and more thoroughly developed, and the vast increase in international trade. These movements are, of course, due largely to the improved facilities for travel and communication, which have brought nations together and made their interests coincide in a way and to an extent unknown to former generations. One of the resulting problems is the question as to the attitude which a given country is to take towards its citizens who have settled permanently in foreign lands, without any definite intention of obtaining naturalization as citizens thereof, and particularly whether it is to undertake to extend its protection to them, and, if so, to what extent.

In considering this question, it is obviously important to bear in mind the fact that persons residing in foreign lands to a great extent stimulate trade with their own country, not only by acting as commercial agents, but also by purchasing its products for their own use, and thereby, consciously or unconsciously, advertising them. Sometimes, perhaps, a country may be influenced by the political expediency of having large numbers of its citizens established in certain foreign countries. Viewing these phases of the matter, it may appear advantageous to any country to retain the allegiance of its citizens residing abroad as long as possible, and to cover them with its protection as far as possible. On the other hand, governments are confronted with the practical difficulty of extending a protection which is real, and not merely nominal, to citizens who have established themselves in foreign lands in large numbers, especially when conditions therein are unsettled. Moreover, assuming that protection by a country should be reciprocated by the performance of the ordinary duties of citizenship to that country, the right of persons permanently residing abroad to claim its protection becomes shadowy, to

say the least, unless, indeed, they are acting as actual representatives of commercial or other concerns in their country of origin. As a general principle it may be said that all persons should perform civic and political duties to some country, and when persons migrate in large numbers to a foreign land, to reside there indefinitely and avail themselves of its resources as far as possible, but fail to acquire its nationality or take a reasonable and responsible part in carrying on its government, an anomalous condition ensues, giving rise to difficult questions, for which municipal laws and international agreements have not as yet furnished a satisfactory solution.

As bearing upon the serious problems just mentioned, the new German law of nationality,[1] which went into effect January 1, 1914, is of much interest, especially as it contains some striking innovations.

The most important features of this law are the abandonment of the provision of the old law of nationality that residence abroad of ten years results in the loss of German nationality,[2] and the introduction of a quite novel provision, according to which Germans residing in foreign countries may retain their German nationality, under certain conditions, after obtaining naturalization as citizens of such countries. This seems to carry the principle of dual nationality further than it has ever been carried before.

The abrogation of Section 21 of the old law is supplemented by the provision of Section 13 of the new, under which persons who have already lost the German nationality by residence abroad of ten years may, without returning to Germany, resume their original nationality.

The principle underlying these changes is thus expressed by Delius:

> Section 13 aims to facilitate as far as possible the reinstatement of lost members of our population as citizens again. The Federal State may (not must), accordingly, renaturalize its former citizens, their descendants, etc., who have not resumed their residence in Germany. In contrast to the citizens of other countries Germans are not in the habit, after they have established themselves abroad, of returning permanently to their homes. Reference is made especially to representatives of commerce, to members of the German communities in Palestine, to missionaries, and in general to persons who by being especially active in

[1] Printed in the SUPPLEMENT to this JOURNAL, page 217.

[2] Law of June 1, 1870, § 21.

the fostering of German-dom abroad, for example in German societies, and particularly by maintaining German schools and churches, do a worthy service.

The possibility of reinstatement as citizens extends not only to persons who have no citizenship but also to such former Germans and their descendants as have acquired a foreign citizenship.[3]

The writer of this commentary evidently had in view also Section 14 of the new law, which reads as follows:

Appointment either made or confirmed by the government or by the central or higher administrative authorities of a State to a position in the direct or indirect service of the State, in the service of a municipality or municipal association, in the public school service or in the service of a religious society recognized by one of the Federal States, counts in the case of a German as assumption and in the case of a foreigner as naturalization, except in so far as a reservation is made in the instrument of appointment or confirmation.

These provisions do not apply in the case of appointment as officer or official in the military reserve.

It is not stated in the foregoing provision that foreigners naturalized thereunder are obliged to divest themselves of their original nationality, nor indeed is this anywhere in the law expressly made a condition to acquisition of German nationality. On the other hand, it is provided in Section 28 of the law that "a German who enters the service of a foreign country without the permission of his government may be declared to have lost his citizenship by decision of the central authorities of his home State, if he does not comply with an order to retire therefrom."

It is noteworthy that in several of its provisions the German law has departed from the principle that residence in the country is a prerequisite to naturalization. The performance of services to the state rather than domicil within its territory appears to be made the basis of German nationality. This idea is carried out in Sections 26 and 32, under which German nationality is lost by Germans residing abroad who have actually deserted from the army or failed to obtain a decision as to their military liability at the proper time, and by Section 27, under which Germans residing abroad may be declared expatriated in case they fail,

[3] Reichs und Staatsangehorigkeitsgesetz, Leipzig, 1913.

in time of war or danger of war, to comply with an order of the Emperor to return.

The most remarkable provision of this law is found in Section 25, which, after stating as a general rule that German nationality is lost by naturalization abroad (a concession long ago made in the Bancroft treaties in cases of Germans naturalized in this country), makes the following exceptional provision:

> Citizenship is not lost by one who before acquiring foreign citizenship has secured on application the written consent of the competent authorities of his home State to retain his citizenship. Before this consent is given the German consul is to be heard.
>
> The Imperial Chancellor may order, with the consent of the Federal Council, that persons who desire to acquire citizenship in a specified foreign country, may not be granted the consent provided for in paragraph 2.

According to this provision, a German residing in a foreign land may acquire naturalization therein without giving up his German nationality unless the laws of that country require the renunciation of the prior allegiance. This provision is apparently intended for the benefit of Germans residing in foreign lands which extend the franchise, the right to hold real property, etc., only to their citizens.

"Dual nationality" in cases of minors, who may be citizens of one country under the *jus soli* and citizens of another under the *jus sanguinis*, is generally recognized, but the new German law makes it possible for persons who have attained majority to assume of their own volition a dual nationality. Perhaps from the standpoint of the two countries concerned, the term "alternate nationality" might be applicable, at least so far as the actual right to protection on the one hand and duties of allegiance on the other are concerned. It will be interesting to learn how this system, under which a man may, at least nominally, serve two political masters, works out. It is to be inferred that a German who acquires a foreign citizenship and still retains his German nationality will be obliged to submit himself unreservedly to the jurisdiction of that one of the two countries concerned in which he happens to be residing. While he is residing in one of them, he presumably cannot call upon the other for any protection whatsoever. On the other hand, it does not seem reasonable to suppose that he could be recalled for military

service from either of the countries concerned by the other. In case of war between the two countries, his position would seem to become anomalous. One obvious question is whether he could be held guilty of treason in case he should take up arms against either country in the army of the other.

While this provision of law may possibly help in some respects to solve the problem mentioned at the beginning of the article, it will doubtless be the cause of some quite difficult questions. It may be added that this provision can have no application to Germans who are naturalized as citizens of the United States, since it is a specific requirement of our naturalization law that an alien who applies for naturalization must expressly renounce allegiance to all other sovereignties, and particularly by name to the sovereignty to which he at the time owes allegiance. On the other hand, it is provided in the second section of our Expatriation Act of March 2, 1907, that an American expatriates himself by obtaining naturalization in a foreign country or taking an oath of allegiance thereto. In this, as well as in other respects, our law of citizenship differs materially from the new German law.

Under Sections 18 to 24 of the law in question, Germans may obtain certificates of expatriation upon application, except, generally speaking, those who are liable for the performance of military service. In view of the provision of Section 25, that German nationality is lost by naturalization abroad, unless specially reserved, these provisions for obtaining certificates of expatriation appear at first sight superfluous, since it is hardly conceivable that any German will desire to divest himself of his German nationality unless he expects to acquire a new nationality. Doubtless these provisions were intended to apply to cases of transfer of citizenship from one Federal State to another, and to enable a person leaving Germany to obtain a clean bill of health, so to speak, as to his military liability.

The only provision of our own laws, under which native Americans may lose their American citizenship, is the first paragraph of Section 2 of the Act of March 2, 1907, which reads as follows:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

The Department of State has ruled in many cases, however, that native Americans residing abroad permanently, under conditions which make it apparent that they have abandoned their country, are not entitled to the protection of the United States Government. In former years the Department held that a definite intention to return to this country to reside on the part of Americans residing abroad was in all cases a condition precedent to protection by this Government, but this hard and fast rule was modified by a circular instruction to diplomatic and consular officers of July 26, 1910, in which it was stated in effect that, while a lack of intention to return to this country raises a presumption of expatriation, such presumption may be overcome. In making this change the Department doubtless had in mind the same conditions of modern intercourse between nations which lie at the root of the changes in the German law noted above.

While protracted residence abroad does not, under any statute of the United States, work expatriation in the case of a native American citizen, it may in the case of a naturalized citizen, for the second paragraph of Section 2 of the Act of March 2, 1907 provides as follows:

> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.

Under the rules prescribed by the Department of State in pursuance of this law, the presumption of expatriation arising under it may be overcome by showing that the person concerned is residing abroad principally as a representative of American trade and commerce and intends to return to this country, or that he is residing abroad for health or education and intends to return, or that he has been prevented by some unforeseen and controlling exigency from returning and intends to return to the United States upon the removal of the preventing cause. There are some special rules applicable to persons residing in countries in which

the United States exercises extra-territorial jurisdiction, and the Department of State has always held that American missionaries, that is, persons residing abroad as representatives of American church organizations, do not expatriate themselves by such residence.

The precise meaning and effect of the statutory provision last quoted was for some time in doubt, but it seems to be pretty generally agreed now that its object is to furnish a definite rule for determining when protection should be withdrawn from naturalized citizens residing abroad, and that the presumption which it raises never becomes conclusive and is canceled in case the person concerned returns to this country to reside permanently.[4] It has been contended that this law is unjust in that it draws a distinction between naturalized and native citizens. However plausible this argument might appear in theory, it remains true that the adoption of the law as it stands was well warranted by actual conditions. It was intended, as stated, to furnish a definite rule for determining the status of naturalized citizens residing abroad and to supply a clear statutory sanction for the withdrawal of protection from that large class of false citizens, who have acquired, or may acquire, naturalization in the United States, not with the intention of casting in their lot permanently with this country and performing the usual duties of citizenship, but merely in order to avoid the performance of military and other duties in their native lands, or in other foreign countries, where they may wish to reside. In practice the law has clearly been justified.

The recent changes in the citizenship laws of Germany and our own country are indications that citizenship laws in general are still in a state of flux. Other changes, resulting from further political and commercial developments, may be looked for in the future, and it is to be hoped that they will be accompanied by international agreements under which disputed questions of citizenship and the right to protection may be set at rest. In particular more satisfactory laws and agreements are needed for deciding the status of persons who are born and reside in countries of which their parents are not citizens, and who, under present laws, have a dual nationality.

A most serious and far reaching problem pertains to the status of

[4] See opinion of the Attorney General in the case of Nazara Gossin, 28 Op. Att'y Gen. 504.

persons who leave their native land and settle permanently in a foreign country, without acquiring its citizenship or taking part in its political life. When such persons settle in large numbers in any country, the question becomes vitally important, especially when the immigrants and their children form a distinct community, which, as in some cases, becomes practically an *imperium in imperio*. As a result of the "new immigration" this has become an important problem in our own country. While it is true that our Government has more than once protested against the application to our own citizens residing in foreign countries of laws under which they are naturalized against their will,[5] there is certainly something to be said in favor of such laws, provided they are not too stringent and make exceptions in cases of persons residing abroad as representatives of commercial or other concerns of their native lands. It is difficult to understand how such laws can be reasonably objected to when applied to ordinary immigrants or "settlers."

As to the right of an individual to throw off his original allegiance at will in acquiring a new citizenship the laws of different nations vary widely. In our own country applicants for naturalization were never required to obtain the consent of their original sovereigns before acquiring American citizenship, but our courts for some years questioned or actually denied the right of Americans to throw off their citizenship and acquire another nationality. Considering the fact that our nation was largely made up of voluntary expatriates, this view now seems inconsistent and unreasonable. In a joint resolution of July 27, 1868, Congress declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness" [6] and finally in Section 2 of the Expatriation Act of March 2, 1907, it was definitely declared that "any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state, or when he has taken an oath of allegiance to any foreign state." This, however, is qualified in the second paragraph, in which it is provided "that no American citizen shall be allowed to expatriate himself when this country is at war." In other words, the right of Americans to expatriate themselves

[5] See Moore's International Law Digest, Vol. III, pages 302–311.
[6] Revised Statutes, 1999.

is absolute during the continuance of the normal condition of peace, but this right is suspended when the country is in the abnormal condition of war. The reasons for the limitation are obvious. Such is also British law as interpreted and applied in the case of Rex *v.* Lynch (L. R. 1903, 1 K. B. 444). The law of Italy permits an Italian to change his nationality at will, but denies that his doing so relieves him from the obligation of military service in Italy.[7] Under French law a Frenchman cannot expatriate himself unless he has performed the prescribed military service in France or has obtained the express permission of the government.[8] A Swiss citizen, to effectively renounce his allegiance, must obtain the approval, not of the Federal Government, but of the Canton to which he belongs.[9] Russia and Turkey still hold fast to the doctrine of indissoluble allegiance, denying their subjects the right to cast off their allegiance without special permission.[10] A British subject expatriates himself by obtaining naturalization as a citizen of another country. The present British law of nationality also contains a peculiar provision according to which an alien who acquires British nationality "shall not, when within the limits of the foreign state of which he was a subject previous to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof or in pursuance of a treaty to that effect." [11] This provision will be abandoned if the British Nationality and Status of Aliens Act, now before Parliament, becomes a law, for Part II, Section 3, Sub-section (1) provides as follows:

> A person to whom a certificate of naturalization is granted by a Secretary of State shall, subject to the provisions of this Act, be entitled to all political and other powers and privileges, and be subject to all obligations, duties and liabilities, to which a natural-born British subject is entitled or subject, and as from the date of his naturalization have to all intents and purposes the status of a natural-born British subject.

This change, it will be observed, is in the contrary direction from the change in the new German law mentioned above.

[7] Civil Code, Articles XI and XII.
[8] Law on Nationality of June 26, 1889, Art. XVII, Sec. I.
[9] Naturalization Law of 1903, II, Arts. XIII and IX.
[10] Russian Penal Code, Art. 325. Ottoman Law of Nationality of 1869, Art. V.
[11] Naturalization Act of 1870, Sec. 7.

The United States has treaties of naturalization with Great Britain, Austria-Hungary, German States, Belgium, Denmark, Norway, Sweden, Portugal and most of the Latin American countries, and it is much to be desired that similar treaties be obtained with France, Italy, Switzerland, Turkey, and Russia, and indeed all of the countries of the world which have not yet consented to enter into agreements calculated to put an end to controversies concerning expatriation. It is also to be hoped that other disputed questions of citizenship, some of which have been touched upon above, may be settled, and that a harmony which does not now exist may be attained, through legislation and international agreements. If such a consummation is to be reached the interests of the countries of immigration and the interests of the countries of emigration must be equally considered, and a reasonable compromise sought between the rights of nations and the rights of individual members thereof. The whole subject of the law of citizenship, in which there is now so much confusion, or at least, in particular phases of it, might well be made a topic of discussion by the Hague Conference.

RICHARD W. FLOURNOY, JR.

NOTES ON THE EXTRADITION TREATIES OF THE UNITED STATES

1. POLICY

The extradition conventions of the United States, from the Jay treaty concluded with Great Britain November 19th, 1794, down to the present time have, with a single exception, contained the requirement that the surrender of a fugitive should be conditioned upon the production and presentation to the country of asylum of such evidence of criminality as would, according to the law of the place where the accused might be found, justify his apprehension and commitment for trial.[1] This implies, therefore, that the conduct of the accused must have been such as to violate the criminal laws of the country of asylum. Only upon such a theory could he be there held for commitment and trial.[2]

The general requirement respecting evidence of criminality necessitates, furthermore, a decision by some authority in the country of asylum as to whether the evidence presented justifies the apprehension

[1] The exception is the convention with Uruguay, March 11, 1905, Malloy's Treaties, II, 1825. Notwithstanding the singular omission, it is not believed that the high contracting parties contemplated any departure from the existing practice, or a lessening of the requirement respecting the sufficiency of evidence to be presented by a demanding government. Arts. IV and V justify this conclusion.

In his work on extradition, § 77, Professor Moore adverts to the fact that Thomas Pinckney, in his negotiations that resulted in the treaty with Spain of October 27, 1795 (which contained no provisions relative to extradition), declined to accede to the Spanish suggestion that transgressors should be surrendered "upon a single demand"; and that he proposed, on the other hand, that any demand should be "supported by testimony of the commission of the crime which should be sufficient in the country to which the fugitive has flown to cause him to be arrested and brought before the tribunals of justice if the crime had there been committed," citing despatches from Madrid, Vol. VI, MSS. Department of State.

[2] "The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and as to the offence charged in this case the treaty of 1889 with Great Britain embodies that principle in terms. The offence must be 'made criminal by the laws of both countries.'" (Fuller, C. J., in Wright *v.* Henkel, 190 U. S. 40, 58.)

and commitment of the accused for trial according to the local law. This involves the exercise of an essentially judicial function.

Although the early treaties of the United States made no provision respecting procedure, and although no Act of Congress offered guidance or direction, the weight of opinion sanctioned the view that judicial rather than executive authority should, in the first instance, pass upon the sufficiency of the evidence presented.[3] An Act of Congress of 1848 supplemented by later legislation has since that time provided for the performance of the judicial function by the judicial rather than the executive branch of the Government of the United States. All extradition treaties subsequent thereto have been regarded as having been concluded with reference to and in harmony with the statutory law.[4]

2. OFFENSES GENERALLY

Since the earliest agreements with England of 1794 and 1842, and with France of 1843 and 1845, there has been a constant and natural increase in the number of offenses made extraditable. Numerous treaties of the Twentieth Century such as those with France of 1909, and with El Salvador of 1911, are fully responsive to the elaborate and intricate needs of the present time. Thus, for example, among the offenses specified are "the willful and unlawful destruction or obstruction of railroads, which endangers human life," and under certain circumstances, the "breach of trust by a bailee, banker, agent, factor, executor, administrator, guardian, trustee or other person acting in a fiduciary capacity." [5] In the more recent treaties the offenses set forth are described

[3] See the Matter of Metzger, 5 How. 176, 188–189, where the Supreme Court of the United States in 1847 approved the action of the President in referring to the judgment of a judicial representative the evidence offered by the French diplomatic officer to secure the extradition of an individual charged with forgery under treaty with France of November 9, 1843.

See also case of Nash under Art. XXVII of the Jay treaty November 19, 1794, Wharton's State Trials, 392.

[4] See Mr. Bayard, Secy. of State, to Mr. Romero, Mexican Minister, Feb. 19, 1889, For. Rel. 1889, 620–621, Moore, Dig., IV, 273.

[5] Convention with France, Jan. 6, 1909, Arts. II, secs. 12 and 7, Charles' Treaties, 34. See also editorial comment, this JOURNAL, V, 1060. See also convention with Honduras, Jan. 15, 1909, Charles' Treaties, 71.

with greater precision and comprehensiveness than in the earlier agreements.[6]

3. POLITICAL OFFENSES

(a) *Development of the rule*

Long before the establishment of international law or of any system of extradition, fugitives were frequently surrendered to the monarchs from whose control they had fled. Surrender was usually induced by the power of the sovereign making the demand. The treatment that might await the fugitive was no deterrent. Hence the return of political offenders bore no resemblance to the modern practice of extradition and was based on a different theory.[7] Consistently with the growth of the idea that no fugitive should be surrendered unless his acts were regarded as criminal at the place of asylum as well as in the country from which he had fled, and with a reluctance to surrender a fugitive who might be exposed to summary and arbitrary treatment if restored to the clutches of the demanding government, the principle of granting asylum to political offenders became general. In the more enlightened states enjoying liberal laws and constitutional government, the acts of an individual participating in and incidental to a revolutionary movement abroad, could not always be regarded as morally wrongful in the country of asylum, notwithstanding its own laws respecting treason. It seemed inequitable that the fate of a revolutionist who had sought refuge in a foreign land, should hang upon the success or failure of the uprising in which he had been a participant.[8]

Thus the very circumstances that rendered the modern practice of extradition practicable and habitual served likewise to check and discourage the surrender of the political fugitive. The municipal laws of certain states, such as Belgium, Switzerland and England, emphasized

[6] In the index to Malloy's Treaties, II, 2448–2449, will be found a list of extraditable crimes contained in treaties of the United States, and references to the conventions in which they are respectively to be found.

[7] See Albéric Rolin, *Les infractions politiques*, Rev. D. I., 1 ser., XV, 417; Moore, Extradition, Chap. VIII, also *id.* §§ 5 and 6; Oppenheim, 2 ed., I, 389–392; W. B. Lawrence, *Albany L. J.*, XIV. 85; Biron and Chalmers, 7–12; Bibliography in Clunet, Tables Générales, I, 790–792, 978.

[8] See Oppenheim, 2d ed., I, § 338.

the principle involved and weakened the efforts of Russia to disregard it.[9]

(b) *Reservation in treaties of the United States*

In almost all of the extradition treaties to which the United States has been a party there is a provision expressly declaring that persons charged with the commission of political offenses shall not be surrendered. With respect to those very few conventions containing no such provision, it is not believed that the contracting parties contemplated the extradition of political offenders.[10]

Without attempting to define the term "political offense," or to enumerate all of the occasions when an act may be said to possess such a character, the effort is made to observe the circumstances when a fugitive within the United States, whose surrender has been sought by a foreign government, has been regarded by the executive or judicial department of the former as a political offender within the meaning of a treaty provision, and therefore discharged from custody. In every case the following elements have been present:[11]

[9] See Oppenheim, 2d ed., I, §§ 333–340.

Although Art. IV of the extradition treaty between Russia and Spain of March 9, 1877 contained a reservation respecting political offenses, that of April 24, 1888 between the same countries made no similar provision, and added to the list of extraditable offenses in Art. II, that of lése majesté with respect to the sovereign or members of his family. See Tratados de España, VII, 221; *id.*, IX, 329.

[10] Declared Mr. Fish, Secretary of State, in a communication to Mr. Hoffman, May 22, 1876:

"Neither the extradition clause in the treaty of 1794 nor in that of 1842 contains any reference to immunity for political offenses, or to the protection of asylum for political or religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain, it was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible, any more than, by the laws of Solon, was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation." (For. Rel. 1876, 233, 237, Moore, Dig., IV, 334.)

See also message of President Tyler, August 11, 1842, submitting treaty with Great Britain of that year to the Senate, Senate Ex. Docs., 27 Cong. 3 Sess., Vol. I, Doc. 2, p. 22 quoted in Moore, Extradition, I, § 152; see also *id.*, I, § 206.

[11] The American cases considered are the following: The Mexican revolutionists of 1880 (For. Rel. 1880, 787–788, Moore, Extradition, I, § 216); case of Francisco J. Cazo, Mexico (Moore, Extradition, I, § 217, and MSS. there cited not contained in published documents of the United States); the Salvadorean refugees (*In re* Ezeta, 62 Fed. Rep. 972; J. B. Moore, in American Law Review, XXIX, 1; For. Rel. 1894,

(1) There has been an uprising of revolutionary origin and purpose against the demanding government. In some cases the uprising has been of vast dimensions, such as that which swept over the Baltic provinces of Russia in 1906; [12] in others it has been of insignificant proportions, as in the case of Cazo,[13] and in that of the San Ignacio raid.[14] In one case, that of Lynchehoun, the act of the accused was incidental to a popular movement to "overthrow landlordism" in Ireland, as a means of securing reform in legislation, a change in the governing classes, and possibly independence from English parliamentary rule.[15] It has been regarded as sufficient if there were in fact a party seeking governmental control, however lacking military or civil organization.[16]

563–576); the San Ignacio raid, Mexico (Ornelas *v.* Ruiz, 161 U. S. 502; For. Rel. 1897, 405–416, Moore, Dig., IV, 336–349); case of James Lynchehoun, Great Britain (Proceedings in the case of James Lynchehoun containing text of decision by Commissioner Charles W. Moores, Indianapolis, 1903); case of Christian Rudovitz, Russia, 1909 (Mr. Root, Secy. of State, to Baron Rosen, Russian Ambassador, Jan. 26, 1909, Dept. of State, file 16649/9, Serial No. 121; printed Statement and Argument, and Abstract of testimony submitted to the Secretary of State in behalf of the accused, January, 1909; E. Maxey, in Green Bag, XXI, 147); case of Pouren, Russia, 1909.

See also case of McKenzie (Moore, Extradition, I, § 211) whose extradition was sought by Canada in 1837 from the authorities of the State of New York, and refused by the latter because, as the acts charged against the accused were regarded as political, they were embraced within the provisions of the New York statute excepting treason from the crimes on account of the commission of which a fugitive might be surrendered by the governor to a foreign state.

See also the St. Albans raid case in 1864, in which a Canadian court ordered the discharge of certain prisoners whose extradition was sought by the United States. Moore, Extradition, § 215, and documents there cited.

An English case frequently cited by American authorities is that of *re* Castioni, 1891, 1 Q. B. 149. See also *re* Meunier, 1894, 2 Q. B. 415; *re* Arton, 1896, 1 Q. B. 108.

See also the Swiss case of Wassilieff, 1908, Entscheidungen des Schweizerischen Bundesgerichtes, XXXIV, pt. I, 533, and comments thereon by Julian W. Mack, 1909, Proceedings Am. Soc. of Int. Law, III, 144, 153.

[12] See Abstract of testimony in the Rudovitz case submitted to the Secretary of State in behalf of the accused, January, 1909.

[13] See Moore, Extradition, I, § 217.

[14] See statement of facts in Ornelas *v.* Ruiz, 161 U. S. 502, 510–511. See also J. Reuben Clark, Jr., Proceedings, Am. Soc. of Int. Law, III, 95, 120.

[15] See Opinion of Commissioner Moores, Proceedings in case of James Lynchehoun, 124–130.

[16] Declared J. Reuben Clark, Jr., 1909, Proceedings, Am. Soc. of Int. Law, III, 95, 120.

"It would also appear from these Russian cases that the party to which the fu-

(2) The accused has been connected with the movement. In no case has there been any serious question as to the relation of the accused to the uprising.[17]

(3) Either the acts charged against the accused have been deemed incidental to the movement; [18] or the evidence has failed to show that

gitive belongs need not, in order to be considered revolutionary, be warlike, that is, it need not at the moment have an armed force in the field or be engaged in military operations.

"And it would seem, further, that such a party need not have control of any of the actual governmental machinery even in the district in which the acts complained of occurred. It would appear to be sufficient if it were an actual party, its operations as well as its organization being secret. It should, however, be noted that in the Russian cases it appeared that although the Russian Government was in actual control of the governmental offices of the revolutionary provinces, the revolutionists maintained among themselves a more or less effective organization and attempted, at least, to govern the members of their own party and to punish those inimical to it."

It seems clear that in the absence of an uprising, acts of violence, whether for the purpose of inciting revolution, or spreading anarchy, would not be regarded as political offenses under the treaties of the United States. See J. B. Moore in Am. L. Rev., XXIX, 16–17, citing *re* Meunier, 1894, 2 Q. B. 415, 419. As the anarchistic theory precludes the idea of government, an avowed anarchist would find difficulty in shielding himself from the consequences of his acts, by asserting a connection with any movement, the object of which was to gain control of a government for the purpose of exercising governmental functions.

[17] Declared Denman, J., in *re* Castioni, (1891) 1 Q. B. 149, 159: "The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as a part of the political movement and rising in which he was taking part." (Cited with approval by Morrow, J., *in re* Ezeta, 62 Fed. Rep. 972, 999; also by Secretary Sherman in the Guerra case (San Ignacio raid), and by Secretary Root in the Rudovitz case.

[18] Declares Prof. Moore: "The act must be connected with the contest; it must be incidental to and form a part of the political disturbance in order to be classed as a political offense." (Am. L. Rev. XXIX, 1, 17.)

With respect to the Rudovitz case Mr. Root, Secretary of State, declared in a communication to Baron Rosen, Russian Ambassador, Jan. 26, 1909:

"In reply I have the honor to say that an attentive reading of the evidence offered at the hearing before the extradition magistrate goes to show,— that on the night of January 3, 1906, a party of some sixteen armed men, masked and disguised, came to the little village of Benen on the estate of Benen and, having gained entrance into certain houses of the village, killed a man (Christian Leshinsky), his wife (Trina Leshinsky), and their married daughter (Wilhelmina Kinze); that they also robbed the Kinze woman and her husband (Theodor Kinze) before killing her; and that some time during the occurrence they set fire to the house in which they had found and

acts committed in the course of the uprising that might possibly not be justly regarded as incidental thereto, were in fact committed by the accused.

While the connection between certain acts, however much to be deplored, such as the killing of spies or the burning of houses, with a political disturbance has oftentimes been apparent, the relation thereto of other acts such as robbery committed simultaneously therewith has been less easy to determine.[19] When the political purpose and nature of an expedition have been recognized, there has been a tendency on the part of the United States, in the absence of conclusive evidence to the contrary, to regard acts of plunder as incidental to the contest. Such an

killed the mother, Trina. It does not appear that the men implicated in the affair gave at the time any reason for the killing of Christian and Trina Leshinsky, though they are said to have declared that they killed the Kinze woman because she was a 'spy.'

"The testimony of the accused given before the extradition commissioner goes to establish that the accused was a member of the Benen group of the Social Democratic Labor party, one of the several revolutionary parties in Russia; that later he joined the Zhagarn group of that party; that at a regular meeting of the Zhagarn group, the death of the Leshinskys and Mrs. Kinze and the burning of the premises, were voted as revolutionary acts and measures; and that the accused participated in the business before this meeting. Other witnesses corroborated his testimony that the aim, purpose, and work of the Social Democratic Labor party were revolutionary and that the death of the persons above named was ordered by one of the organizations of that party. Although there was some discrepancy in the evidence as to just which local organization passed the original death decree, this has appeared to be immaterial in view of the evidence to the fundamental fact that some organization of this revolutionary party did actually decree that the persons named should be put to death. The witnesses testifying to these matters were not impeached and the demanding Government introduced no evidence to controvert their testimony.

"In view of these facts and circumstances the Department after a mature and careful consideration of the evidence so adduced in this case, finds itself forced to the conclusion that the offenses of killing and burning with which the accused is charged are clearly political in their nature." (File No. 16649/9, Serial No. 121.)

[19] Thus in the Rudovitz case it was urged by counsel for the demanding government in argument before the committing magistrate, that the prisoner should be held to answer to the charge of robbery, in case he could not be held on any other, on the ground that the acts of robbery were not, in the judgment of counsel, connected with or incidental to the uprising in the Baltic provinces. See printed Statement and Argument in behalf of the accused, page 10. See also Mr. Romero, Mexican Minister, to Mr. Sherman, Secy. of State, November 15, 1897, For. Rel. 1897, 406, Moore, Dig., IV, 337.

inference has been reasonable when the evidence has failed to disclose that an expedition had a two-fold purpose, namely the private enrichment of the participants as well as the accomplishment of an essentially public purpose. It has been admitted however, that in the course of an uprising, wanton acts of robbery might be committed for purely private ends, and so render the actors extraditable on such a charge.[20] In certain cases, the evidence has failed to show that the accused himself committed such acts, and the United States has declined under those circumstances, to impute to the prisoner, himself a participant in a political uprising, responsibility for an extraditable offense committed by a comrade.[21]

When the political nature of an uprising has been recognized, the connection of the accused therewith established, and the acts charged against him regarded as incidental thereto, it has been deemed immaterial whether the act committed was such as might under normal circumstances be looked upon as a common crime, such as murder or arson;[22] whether the accused bore malice towards his victim;[23] whether the individual against whose person or property the act was directed, was a

[20] See Mr. Sherman, Secy. of State, to Mr. Romero, Mexican Minister, Dec. 17, 1897, For. Rel. 1897, 408, 414, Moore, Dig., IV, 340, 347.

[21] See *id.;* also Mr. Root, Secy. of State, to Baron Rosen, Russian Ambassador, Jan. 26, 1909, in which it was said:

"The robbery committed on the same occasion was a natural incident to executing the resolutions of the revolutionary group and can not be treated as a separate offense, certainly not as a separate offense by this man without some specific identification of him with that particular act, and of this there is no evidence whatever. Therefore, none of these offenses is such as will afford a proper and sufficient ground for the extradition of the accused to Russia." (File 16649/9, Serial No. 121.)

[22] The decisive point has always been the nature of the expedition and the relation thereto of the actor and of the acts chargeable to him, rather than the nature of what was done. This has been true even when the case arose under the treaty with Mexico of 1861 reserving from its application offenses of a "purely political character." (See Mr. Sherman, Secy. of State, to Mr. Romero, Dec. 17, 1897, For. Rel. 1897, 408, Moore, Dig., IV, 340.) Compare in this connection articles adopted by the Institute of International Law, Sept. 8, 1892, *Annuaire*, XII, 182; also report of Albéric Rolin relative thereto, *id.*, 156; Frederic R. Coudert, 1909, Proceedings Am. Soc. of Int. Law, III, 124, 143.

[23] Towards Mrs. Kinze, a victim of the expedition in the Rudovitz case, there was felt the deepest malice by those who brought about her death. See also J. B. Moore, in Am. L. Rev. XXIX, 1, 17.

member of the civil or military branch of the government sought to be overthrown.[24]

ASSASSINATION OF THE HEAD OF A STATE. As the assassination of an individual may occur under circumstances such as to render the actor immune from extradition as a political offender, numerous treaties of the United States have in varying form provided that an act of such a kind, directed against the life of the sovereign or head of a foreign state, or a member of his family, shall not be deemed to be of a political character.[25] No cases have yet arisen where pursuant to such a provision the United States has been called upon to surrender an assassin whose victim has belonged to one of the classes enumerated.[26]

[24] See J. Reuben Clark, Jr., 1909, Proceedings, Am. Soc. of Int. Law, III, 95, 120, who, after stating that this point is settled by the recent Russian cases (of Rudovitz and Pouren), declares that:

"Moreover, it would appear from the cases that it is not necessary that the uprising, if it actually exists, should be of any considerable extent or that it give particular promise of being successful. This seems to be established by the case of Guerra, in which, if the transactions in which Guerra took part be divorced from the attending circumstances, the expedition in which he was engaged resembles raids of a marauding band rather than an armed expedition of a warlike party, and this same observation applies with equal force to the activities of Cazo, the defendant in an earlier case."

[25] See, for example, Art. III, treaty with Russia, March 16, 1887, Malloy's Treaties, II, 1528; Art. IV, treaty with Belgium, Oct. 26, 1901, *id.*, I, 106; Art. IV, treaty with Guatemala, Feb. 27, 1903, *id.*, I, 881; Art. III, treaty with Spain, June 15, 1904, *id.*, II, 1714; Art. III, treaty with El Salvador, April 11, 1911, Charles' Treaties, 108.

Art. III of the treaty with Brazil, May 14, 1897, and May 28, 1898, declares that acts "such as constitute murder, or wilful and illegal homicide," when directed against the lives of specified officials "shall not be considered political crimes when they are unconnected with political movements." Malloy's Treaties, I, 148.

Concerning the so-called *attentat* clause in the Belgian Law of 1856, see Oppenheim, 2d ed., § 335.

See also Julian W. Mack, 1909, Proceedings, Am. Soc. of Int. Law, 144, 151–152, citing the Swiss cases of Jaffai, Entscheidungen des Schweizerischen Bundesgerichtes, XXVII, 52, and of Malatesta, *id.*, XVII, 450.

See also § 852 (2) of the Russian Law on Extradition, sanctioned by the Czar Dec. 15, 1911, Rev. D. I., 2 ser., XIV, 187, 188.

[26] Concerning correspondence with Great Britain in 1865, and the Papal States in 1866, respecting the surrender to the United States of persons involved in the assassination of President Lincoln, see Moore, Extradition, I, § 208, p. 308, note No. 4, citing Dip. Cor. 1865, Part I, 386; *id.*, Part II, 142; *id.*, 1866, Part II, 121–125. See also Moore, Dig., IV, 352–353.

(c) *Burden of proof*

American authority indicates clearly that when evidence offered before a committing magistrate tends to show that the offenses charged against the accused are of a political character, the burden rests upon the demanding government to prove the contrary.[27] Furthermore, it becomes the duty of the magistrate to pass upon the evidence presented as to the political character of the acts committed.[28] From his decision there is no appeal save to the Secretary of State.[29] In all cases, whatsoever be the nature of the defense, he exercises the right to review the decision of a magistrate committing the prisoner to await extradition.[30]

4. CITIZENS

(a) *Of the country of refuge*

In negotiating extradition treaties the United States has oftentimes sought the omission of a common provision exempting a contracting party from the duty to surrender its own citizens.[31] The attempt has

[27] See Morrow, J., in *Re* Ezeta, 62 Fed. Rep. 972, 999, quoting with approval recommendation of International American Congress of 1890; Mr. Sherman, Secy. of State, to Mr. Romero, Mexican Minister, Dec. 17, 1897, For. Rel. 1897, 408, 413, 414, Moore, Dig., IV, 340, 346; Commissioner Moores, Proceedings, Lynchehoun Case, 124–125. See also Hon. Julian W. Mack, 1909, Proceedings, Am. Soc. of Int. Law, III, 144, 153–155; and compare J. Reuben Clark, Jr., *id.*, 96–102.

[28] Such was the position taken by Judge Morrow, in the Ezeta Case, and by Commissioners Moores and Foote, respectively, in the Lynchehoun and Rudovitz cases. Declared J. B. Moore, in Am. L. Rev. XXIX, 1, 16:

"At the end, extradition, whatever may be the character of the offense, is a political act; but, prior to that stage, it is, both in the United States and England, chiefly a judicial proceeding, in which the person charged is entitled to be set at liberty whenever he has shown that his detention is not warranted by the treaty."

[29] See Ornelas *v.* Ruiz, 161 U. S. 502. The situation would be otherwise, however, in the fanciful case where, irrespective of the testimony offered, it should appear from the allegations of the complaint that extradition of the accused was sought in order to prosecute him for a political offense, and the decision of the committing magistrate was adverse to the contentions of the prisoner.

[30] See J. Reuben Clark, Jr., 1909, Proceedings Am. Soc. of Int. Law, III, 95, 114–118.

[31] See Mr. Fish, Secy. of State, to Mr. Delfosse, Belgian Minister, Aug. 11, 1873, For. Rel. 1873, I, 84; Mr. Gresham, Secy. of State, to Mr. Bartleman, No. 110, June 11, 1894, MS. Inst. Venezuela, IV, 304, Moore, Dig., IV, 288; Mr. Olney, Secy.

however, rarely been successful; in most instances the United States has been obliged to accept the restriction.[32] With respect to treaties containing no restriction, such as those with Switzerland of November 25, 1850, and with Italy of March 23, 1868, the United States has uniformly contended that by reason of the general terms employed, the contracting parties undertook to surrender their respective citizens.[33] The highest court of Switzerland in 1891 acquiesced in the American interpretation of a treaty with that country, as it appeared that such was the clear

of State, to Mr. Ransom, Minister to Mexico, Dec. 13, 1895, For. Rel. 1895, II, 1008, 1009, Moore, Dig., IV, 289.

Declared Mr. Blaine, Secy. of State, to Baron Fava, Italian Minister, June 23, 1890:

"But the chief object of extradition is to secure the punishment of crime at the place where it was committed, in accordance with the law which was then and there of paramount obligation. It is for this purpose that extradition treaties are made, and, except in so far as their stipulations may prevent the realization of that design, they are to be executed so as to give it full effect. It is at the place where the offense was committed that it can most efficiently and most certainly be prosecuted. It is there that the greatest interest is felt in its punishment and the moral effect of retribution most needed. There, also, the accused has the best opportunity for defense, in being confronted with the witnesses against him; in enjoying the privilege of cross-examining them; and in exercising the right to call his own witnesses to give their testimony in the presence of his judges. These and other weighty considerations, which it is not necessary to state, have led what I am inclined to regard as the great preponderance of authorities on international law at the present day to condemn the exception of citizens from the operation of treaties of extradition." (For. Rel. 1890, 559, 566, Moore, Dig., IV, 290, 296.)

See also admirable statement in Moore, Dig., IV, 287.

[32] The existing treaties with Great Britain and Italy contain no restriction. The convention with France of Nov. 9, 1843, was similarly free, and likewise that with Switzerland of Nov. 25, 1850. Later conventions, however, with France of Jan. 6, 1909, and with Switzerland of May 14, 1900, expressly remove any obligation to surrender citizens. According to Art. III of the treaty with the Argentine Republic of Sept. 26, 1896, Art. VII of that with Japan of April 29, 1886, and Art. IV of that with Mexico of Feb. 22, 1899, it is provided in differing form that while the contracting parties are not bound to surrender their respective citizens, each party, ("the executive authority of each," in the Mexican treaty) shall have the power to deliver them up, if in its discretion it should be deemed proper to do so.

See case of Mattie D. Rich, an American citizen, arising under the Mexican treaty, For. Rel. 1899, 497–501, Moore, Dig., IV, 303; also case of Yoshitaro Abe, a Japanese subject extradited from Japan to Hawaii, For. Rel. 1908, 512–515.

[33] See Mr. Blaine, Secy. of State, to Baron Fava, Italian Minister, June 23, 1890, For. Rel. 1890, 559, Moore, Dig., IV, 290.

understanding of the parties when the agreement was concluded.[34] Italy, however, has always asserted that its treaty with the United States imposed no duty on the former to surrender its own subjects. It has emphasized the fact that by the Italian penal code in force at the time of the negotiation of the treaty, and ever since in force, "the extradition of a citizen is not admissible." [35] The United States, on the other hand, has contended that the circumstances attending the negotiation indicate a different understanding by both parties. Notwithstanding the divergence of views, the United States has not treated the Italian practice as a breach of the contractual obligation requiring abrogation of the treaty. While it has ceased generally to make requisition for Italian subjects, it has not regarded itself as free from the obligation of surrendering its own citizens. On the theory, therefore, that in such matters extradition treaties need not be reciprocal in their operation, Mr. Knox, Secretary of State, in 1910 decided that the United States should surrender to Italy one Charlton, an American citizen, charged with the commission of murder in that country,[36] and the Supreme Court of the United States, in consequence thereof, declared it to be its duty to recognize the obligation to surrender the accused "as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition." [37]

(b) *Of a third country*

According to the treaties of the United States, the fact that a fugitive whose surrender is demanded by a contracting party is a citizen of a third state is not made an obstacle to extradition. The common provision respecting the situation where the surrender of one person is sought by several states simultaneously, never creates a preference in favor of a demanding country to which the fugitive may belong.[38] This emphasizes

[34] Case of Piguet, 1891, Entscheidungen des Schweizerischen Bundesgerichtes, XVII, 85–91. A translation of the major portion of the opinion is contained in Moore, Dig., IV, 298–300.

[35] See Baron Fava, Italian Minister, to Mr. Blaine, Secy. of State, April 20, 1890, For. Rel. 1890, 555.

[36] See Memorandum of Mr. Knox, Secy. of State, Dec. 9, 1910, *re* Porter Charlton, this JOURNAL, V, 188. See also *Ex parte* Charlton, 185 Fed. Rep. 880, 886–887.

[37] Charlton *v.* Kelly, 229 U. S. 447, 476.

[38] It is usually provided that extradition shall be granted to the state whose de-

the unimportance of his nationality except in so far as he may be a citizen of the state of refuge.[39]

The United States does not question the right of a foreign state to surrender to another an American citizen whose extradition from the former has been demanded.[40] This is true even where the state of refuge, according to its own laws, habitually surrenders fugitives in the absence of extradition treaties, upon a stipulation of reciprocity to a demanding government.[41] The energies of the Department of State are limited to the effort to secure for the accused the enjoyment of all rights which are applicable to extradition cases in the country where the fugitive is apprehended, and upon which the demand for surrender is made.[42]

5. IRREGULAR RECOVERY OF FUGITIVE

Oftentimes by processes bearing no resemblance to extradition, the fugitive is returned to the country from which he has fled and is there

mand is first received, provided that the government from which extradition is sought is not bound by treaty to give preference otherwise. See, for example, Art. XI of the treaty with Peru, Nov. 28, 1899, Malloy's Treaties, II, 1448. According to Art. VIII of the treaty with Uruguay, March 11, 1905, the fugitive is to be surrendered to that state in which he shall have committed the gravest crime, Malloy's Treaties, II, 1828. Compare Art. X, treaty with France, Jan. 6, 1909, Charles' Treaties, 36.

See also Mr. Marcy, Secy. of State, to Mr. Gadsden, Minister to Mexico, No. 54, Oct. 22, 1855, MS. Inst. Mexico, XVII, 54, Moore, Dig., IV, 305.

[39] As the existing treaty with Mexico (Feb. 22, 1899) contemplates the surrender of American citizens, under circumstances specified in Art. IV, and also provides in Art. XII for the subsequent surrender to a third Power, of a person who has been given up, an American citizen surrendered by the United States to Mexico, might, under the conditions specified, be later surrendered by Mexico to a third state.

[40] See Moore, Extradition, § 143; Mr. Uhl, Acting Secy. of State, to Mrs. Jewitt, April 13, 1894, 196, MS. Dom. Let. 350, Moore, Dig., IV, 306.

Declared Mr. Bacon, Acting Secy. of State, to Ambassador White, April 3, 1907:

"Precisely the same rule obtains in the United States where the surrender of citizens or subjects of a third government is demanded. The diplomatic representative of such government has sometimes made representations to this department with a view to the protection of its national; but the department has always considered that his legitimate functions are limited to safeguarding the fugitive's rights by observing the course of the proceedings so as to satisfy himself that all the forms of law have been complied with before extradition is granted." (For. Rel. 1907, I, 425.)

[41] See documents relative to the extradition of F. L. Jacobs, an American citizen, to the Argentine Republic from France. For. Rel. 1907, I, 411–430.

[42] See Mr. Wilson, Third Assist. Secy. of State, to Mr. Jacobs, May 25, 1907. For. Rel. 1907, I, 428.

sought to be prosecuted criminally. Thus he may be abducted from foreign territory by agents of the state of prosecution. In such event the state whose territory has been invaded may demand the return of the individual, or the extradition of those who removed him from its domain.[43] When the fugitive is taken from the state of refuge by its own citizens or by persons under its control, and by them placed within the territory of the state from which he has fled, there is no reason for interposition on the part of the former.[44] In an important case, that of the British Indian Savarkar, which became the subject of adjudication before the Hague Tribunal, it was held that the arrest and restoration to the British mail steamer *Morea* at Marseilles July 7, 1910, by a French police officer of the fugitive who had escaped from that vessel where he was in custody while en route to India for prosecution on account of political offenses, did not impose upon the British Government a duty to restore him to France. It was declared that while it appeared that the French officer was not aware of the nature of the charges against the prisoner and so made a mistake in giving him up, there was nevertheless no bad faith on the part of the British authorities who participated in the matter, and no violation of the sovereignty of France; and that under the circumstances there was no rule of international law imposing a duty upon Great Britain to give Savarkar up.[45]

[43] See instructions of the Department of State to the American Minister at Madrid, Aug. 18, Sept. 12, Sept. 16, and Dec. 8, 1891, and March 24, 1892, MS. Inst. Spain, XXI, 54, 65, 66, 91; also dispatch No. 216, of March 5, 1892, from the American legation at Madrid, 124 MS. Despatches, from Spain, Moore, Dig., IV, 330; Mr. Foster, Secy. of State, to Mr. Washburn, Minister to Switzerland, July 27, 1892, For. Rel. 1894, 649, 650, Moore, Dig., IV, 330. Compare Mr. Seward, Secy. of State, to Lord Lyons, British Minister, June 6, 1863, MS. Notes to Great Britain, X, 67, Moore, Dig., IV, 329.

[44] See Mr. Adams, Secy. of State, to Mr. Jackson, Jan. 24, 1822, 19 MS. Dom. Let. 248, Moore, Dig., IV, 328; also facts in *Ex parte* Wilson, 140 S. W. Rep. 98.

In the recent case of Antonio Martinez, kidnapped in Mexico by a Mexican, brought into the United States and prosecuted in California, the Department of State was of the opinion that after having surrendered to Mexico one Felix, the kidnapper, the United States was under no obligation to comply with the demand of Mexico for the surrender of Martinez as well. It was observed that as the latter was being prosecuted by the State of California, the Federal Government felt itself unable to secure his release from custody. For. Rel. 1906, II, 1121–1122.

[45] Award of the Permanent Court of Arbitration of the Hague in the case of Savarkar, between Great Britain and France, Feb. 24, 1911, this JOURNAL, V, 520; see

Whatever may be the right of the state from which he has been withdrawn, the prisoner is not entitled to his release from custody merely by reason of the irregular process by which he was brought into the state of prosecution.[46]

6. LIMITATIONS AS TO TRIAL

(a) *Offenses other than those for which accused was extradited*

The Supreme Court of the United States, in 1886, announced the principle that:

> A person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he has been forcibly taken under those proceedings.[47]

The decision was based primarily upon existing statutes of the United States. These the court declared might be regarded as a "Congressional construction of the purpose and meaning of extradition treaties," such as the one under consideration; but whether so or not, the Acts of Congress were said to be conclusive upon the judiciary as to the right conferred upon persons brought from a foreign country into the United

also editorial comment, *id.*, V, 208; Oppenheim, 2d ed., § 332, and periodical literature there cited.

[46] See Ker *v.* Illinois, 119 U. S. 436; *Ex parte* Wilson, 140 S. W. Rep. 98; Mr. Bacon, Acting Secy. of State, to the Mexican Chargé, June 22, 1906, For. Rel. 1906, II, 1121.

[47] United States *v.* Rauscher, 119 U. S. 407, 430. The prisoner having been surrendered by Great Britain on a charge of the murder of one Janssen on the high seas, pursuant to the treaty of 1842, was indicted and tried under § 5347 Rev. Stat. charging him with cruel and unusual punishment of the same man. This offense was not embraced in those made extraditable by the treaty, which, moreover contained no express provision relative to the prosecution of a person surrendered for any offense other than one specified in the agreement. The case came before the Supreme Court of the United States on a certificate of division of opinion between the judges of the United States Circuit Court for the Southern District of New York, arising after verdict of guilty and before judgment, on a motion in arrest of judgment.

Concerning the Rauscher case and for a summary of the judicial history of the subject in the United States, see Moore, Dig., IV, 310–311; also Moore, Extradition, I, § 187, pp. 276–280.

States, under extradition proceedings.[48] The court also expressed its own view as to the interpretation of the treaty of 1842 with Great Britain, declaring it to be "very clear" that it was not intended that the agreement was to be used for any purpose other than to secure the trial of the person extradited for one of the offenses enumerated in the treaty.[49]

The decision was contrary to the position taken by Mr. Fish, Secretary of State, in the Winslow case in 1876.[50] It not only confirmed the British opinion as to the interpretation of the treaty of 1842, but also served, in the minds of English judges, to meet the requirements of the British Extradition Act of 1870.[51]

The treaties of the United States commonly provide for the protection of the accused against prosecution for an offense committed prior to his surrender and other than that for which he was extradited. Such provisions lack uniformity in scope and in form. Some seem to prohibit the prosecution of the accused for any offense other than that for which he was surrendered.[52] Frequently the restriction is limited. Thus the fugitive, according to some conventions, may still be prosecuted if he

[48] 119 U. S. 407, 423–424. See also opinion of Gray, J., concurring, *id.*, 433.

[49] *Id.*, 419–420.

[50] See Mr. Fish, Secy. of State, to Mr. Hoffman, Mar. 31, 1876, For. Rel. 1876, 210, 215. Concerning the Winslow case, see For. Rel. 1876, 204–309, Appendix A, *id.*, Moore, Extradition, I, § 150; Moore, Dig., IV, 306–309 and documents there cited. Concerning case of one Lawrence, see Moore, Extradition, I, § 151.

[51] See report of proceedings in England in case of Alice Woodhall, Moore, Extradition, I, § 166

Respecting the application of the principle announced in the Rauscher case, in relation to certain treaties, see Cosgrove *v.* Winney, 174 U. S. 64; *In re Rowe*, 77 Fed. Rep. 161; Cohn *v.* Jones, 100 Fed. Rep. 639; Johnson *v.* Browne, 205 U. S. 309; Collins *v.* O'Neil, 214 U. S. 113; also Moore, Dig., IV, 312–318, and documents there cited; Frederick Van Dyne, in Cyc. of Law and Procedure, XIX, 81–82.

Civil Suits. Relative to the question whether a fugitive surrendered pursuant to the terms of an extradition treaty may, prior to a reasonable opportunity to leave the country after his discharge from custody, be arrested in or otherwise be made answerable to a civil action, see Moore, Extradition, I, §§ 178–187, and cases there discussed; documents cited in Moore, Dig., IV, 327–328; cases cited by Frederick Van Dyne in Cyc. Law & Proc., XIX, 82. See also express provision in Art. VII, treaty with France, Jan. 6, 1909, Charles' Treaties, 36.

[52] See, for example, Art. III, treaty with Italy, March 23, 1868, Malloy's Treaties, 967; Art. IV, treaty with Portugal, May 7, 1908, *id.*, 1469.

has had an opportunity to return to the country from which he was surrendered,[53] or if he has been given a month's grace after trial, conviction or pardon, in which to leave the country to which he was surrendered.[54] Sometimes the consent of the accused "freely granted and publicly declared by him" suffices.[55] Oftentimes the consent is reserved by the surrendering state,[56] which, in some instances, is given the right to require the production of documents respecting prosecution or conviction.[57] There is a tendency manifested in the more recent treaties to make a distinction between offenses enumerated in the agreement to extradite and those not contained therein. Thus, according to Art. IV of the treaty with the Netherlands of June 2, 1887, the restriction against punishing the accused for an offense other than that for which he was surrendered is removed in case the offense charged is one of those embraced in the convention.[58] According to a provision appearing in

[53] See Art. III, treaty with Great Britain, July 12, 1889, Malloy's Treaties, I, 741; Art. VIII, treaty with the Argentine Republic, Sept. 26, 1896, *id.*, I, 27. Relative to the application of the British treaty, see Cosgrove *v.* Winney, 174 U. S. 64; Bryant *v.* United States, 167 U. S. 104; Johnson *v.* Browne, 205 U. S. 309; Cohn *v.* Jones, 100 Fed. Rep. 639; correspondence with Great Britain in 1891, *re* Leda Lamontagne, Moore, Dig., IV, 314–315 and documents there cited.

[54] See Art. VII, treaty with France of Jan. 6, 1909, U. S. Treaty Series, No. 561, Charles' Treaties, 36.

See also correspondence between Mr. Sternburg, German Ambassador, and Mr. Root, Secretary of State, in 1907, with respect to the operation of the existing extradition treaty with Germany, containing no provision as to the circumstances when a person extradited thereunder might be prosecuted and punished for an offense committed prior to extradition. For. Rel. 1907, I, 517–519.

[55] See, for example Art. VIII, treaty with Norway, June 7, 1893, Malloy's Treaties, II, 1303; Art. VIII, treaty with Denmark, Jan. 6, 1902, *id.*, I, 393. According to Art. IX of the treaty with Switzerland, May 14, 1900, the consent of the accused is to be expressed in open court and entered upon the record, *id.*, II, 1774.

[56] See Art. IX, treaty with Peru, Nov. 28, 1899, Malloy's Treaties, II, 1448; Art. III, treaties with Uruguay and Paraguay, March 11, 1905, *id.*, II, 1826. See correspondence, 1894–1895, with the German Embassy at Washington relative to the consent of Jacob David to trial in Illinois for an offense other than that for which he was extradited from Prussia, pursuant to the treaty of June 16, 1852, which contained no provision relative to the matter. For. Rel. 1895, I, 488–497, contained in part in Moore, Dig., IV, 320–326. See also documents *id.*, IV, 319 and 326.

[57] This provision frequently appears. See, for example, Art. IV, treaty with El Salvador, April 11, 1911, Charles' Treaties, 109.

[58] Malloy's Treaties, II, 1268.

Art. IV of the treaty with Brazil of May 14, 1897, the right given the accused to a month of grace in which to leave the country to which he was surrendered, prior to his prosecution for an offense other than the one embraced in the treaty, may be lost to him, should the attempt be made to prosecute him for an offense specified in the convention other than that for which he was surrendered, and provided the consent of the surrendering government be given.[59] Certain treaties go further, and make express provision that the accused may be prosecuted for an offense mentioned in the agreement other than that for which he was surrendered, subject to notice to the surrendering state, to which is reserved the right to demand the production of documents.[60]

The treaties of the United States do not purport to limit in any way the prosecution of the accused at any time after his surrender for any offense whatsoever committed subsequent to extradition, against the laws of the state to which he has been given up. The Supreme Court of the United States has clearly declared that nothing in the Rauscher case is authority for the contention that any duty rests upon the state to which surrender has been made, to afford the accused opportunity after his trial or other termination of his case, to return to the country from which he was extradited.[61]

(b) *Limitation of trial by prescription*

Provision is frequently made in the more recent treaties of the United States that extradition shall not be granted if the enforcement of the

[59] Malloy's Treaties, I, 148. Similar provision is to be found in Art. III, treaty with Belgium, Oct. 26, 1901, *id.*, I, 107; Art. III, treaty with Guatemala, Feb. 27, 1903, *id.*, I, 880; Art. III, treaty with Nicaragua, March 1, 1905, *id.*, II, 1295; Art. III, treaty with San Marino, Jan. 10, 1906, *id.*, II, 1600.

[60] See Art. III, treaty with Luxemburg, Oct. 29, 1883, Malloy's Treaties, I, 1055; Arts. XII and XIII, treaty with Mexico, Feb. 22, 1899, *id.*, I, 1189.

[61] Collins *v.* O'Neil, 214 U. S. 113; affirming *in re* Collins, 151 California 340. Declared Peckham, J., in the course of the opinion of the court:

"It is impossible to conceive of representatives of two civilized countries solemnly entering into a treaty of extradition, and therein providing that a criminal surrendered according to demand, for a crime that he has committed, if subsequently to his surrender he is guilty of murder or treason or other crime is, nevertheless, to have the right guaranteed to him to return unmolested to the country which surrendered him. We can imagine no country, by treaty, as desirous of exacting such a condition of surrender or any country as willing to accept it." (*Id.*, 122–123.)

penalty for the act committed by the accused has been barred by limitation according to the laws of the country to which the requisition is addressed.[62] According to a very few conventions, there is a similar reservation, if from lapse of time (or other lawful cause) the accused is exempt from prosecution according to the law of the place where the offense is committed.[63] By one treaty extradition is precluded when by the law of either the demanding country or that upon which extradition is made "the criminal prosecution or penalty imposed is barred by limitation." [64]

7. REQUISITION. MANDATE

The formal demand for the extradition of a fugitive is known as the requisition and must emanate from the executive authority of the demanding state.[65] The treaties of the United States commonly provide that requisition shall be made by the diplomatic agents of the contracting parties, or in their absence, by superior consular officers.[66]

[62] See, for example, Art. VIII, treaty with France, Jan. 6, 1909, Charles' Treaties, 36. Concerning this treaty see editorial comment, this JOURNAL, V, 1060.

[63] See, for example, Art. V, treaty with the Dominican Republic, June 19, 1909, Charles' Treaties, 27; Art. V, treaty with El Salvador, April 18, 1911, *id.*, 109; Art. V, treaty with Spain, June 15, 1904, Malloy's Treaties, II, 1715.

[64] Art. VIII, treaty with Switzerland, May 14, 1900, Malloy's Treaties, II, 1773. See also Art. II, convention concluded by Central American States at Central American Peace Conference, Washington, Dec. 20, 1907, For Rel. 1907, II, 702.

MISCELLANEOUS PROVISIONS. It may be observed that the more recent treaties of the United States make provision for the deferring of extradition where the accused is being prosecuted in the state upon which requisition is made, for an offense there committed, until he is entitled to liberation. (See, for example, Art. VI, treaty with Guatemala, Feb. 27, 1903, Malloy's Treaties, I, 881.)

Provision is frequently made respecting articles found in the possession of the accused and obtained through the commission of the act with which he is charged (See, for example, Art. IX, treaty with Brazil, May 14, 1897, Malloy's Treaties, I, 149), or which may be material as evidence in making proof of the crime. (See, for example, Art. X, treaty with Spain, June 15, 1904, Malloy's Treaties, II, 1715.)

[65] See Cushing, Atty-Gen., 7 Op. 6; see also Moore, Extradition, § 219.

[66] See, for example, Art. X, convention with Brazil, May 14, 1897, Malloy's Treaties, I, 150.

According to Art. IX of the treaty with Mexico of Feb. 22, 1899, it is provided that:

"In the case of crimes or offenses committed or charged to have been committed in the frontier states or territories of the two contracting parties, requisitions may be made either, through their respective diplomatic or consular agents as aforesaid, or through the chief civil authority of the respective state or territory, or through such

While a formal requisition is always a condition precedent to the final surrender of the fugitive, it bears no such relation to his arrest or to the judicial proceedings in the United States preliminary to commitment.[67] Requisition is always to be made upon the foreign offices of the contracting parties, and hence, when the demand is made upon the United States, it must be addressed to the Secretary of State.[68]

The Federal courts and the Department of State seem at the present time to be agreed that the provisions of § 5270 of the Revised Statutes render unnecessary the issuance of a mandate or a certificate of requisition by the Secretary of State as a foundation for proceedings in the United States with a view to the arrest or commitment of a fugitive.[69]

chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier states or territories, or when, from any cause, the civil authority of such state or territory shall be suspended, through the chief military officer in command of such state or territory, and such respective competent authority shall thereupon cause the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination." (Malloy's Treaties, I, 1188.)

See also Art. III of convention with the Netherlands, January 18, 1904, extending to the island possessions and colonies of the contracting parties the extradition treaty of June 2, 1887, Malloy's Treaties, II, 1272; also Art. XIII, of treaty with France of January 6, 1909, respecting the requisition for the surrender of a fugitive criminal who has taken refuge in a colony or foreign possession of either contracting party, Charles' Treaties, 37.

[67] Provision is frequently made, as in Art. IX of the treaty with Nicaragua of March 1, 1905 (Malloy's Treaties, II, 1296), for the provisional detention of the fugitive prior to the presentation of a formal demand for his surrender. See also Benson *v.* McMahon, 127 U. S. 457; *In re* Adutt, 55 Fed. Rep. 376; *In re* Orpen, 86 Fed. Rep. 760; *In re* Schlippenbach, 164 Fed. Rep. 783.

[68] See Cushing, Atty-Gen., 8 Op. 40; also Bonaparte, Atty-Gen., July 10, 1908, For. Rel. 1908, 595.

Relative to applications by the United States for the extradition from foreign countries of fugitives from justice, see general circular of the Department of State, October, 1892, Moore, Dig., IV, 356; circular relative to the extradition of fugitives from the United States in British jurisdiction, May, 1890, Moore, Dig., IV, 359; documents contained and cited in Moore, Dig., IV, 362–368 relative to extradition of fugitives from Mexico.

[69] See Benson *v.* McMahon, 127 U. S. 457; *In re* Adutt, 55 Fed. Rep. 376; *In re* Orpen, 86 Fed. Rep 760; *In re* Schlippenbach, 164 Fed. Rep. 783; *Ex parte* Charlton, 185 Fed Rep. 880.

See alsc Mr. Bayard, Secy. of State, to Mr. West, Feb. 16, 1886, MS. Notes to Great Britain, XX, 189, Moore, Dig., IV, 371.

Hence, it is believed that the provisions of certain treaties indicating that judicial proceedings shall be dependent upon the exhibition of a mandate or certificate of requisition are rendered unimportant.[70]

8. PROVISIONAL DETENTION

Numerous treaties provide for the detention of a fugitive on proper application prior to the formal requisition for surrender. Such provision is commonly followed by the declaration that the fugitive shall be released from custody, unless formal requisition together with the documentary proofs be made within a specified period after the date of arrest.[71] As the Act of Congress is considered applicable to such cases, it is the practice in the United States to make provisional arrest irrespective of the existence of appropriate treaty provisions with demanding

[70] See Mr. Frelinghuysen, Secy. of State, to Mr. Barca, May 23, 1882, MS. Notes to Spain, X, 204, Moore, Dig., IV, 370; Mr. Gresham, Secy. of State, to Prince Cantacuzene, Russian Minister, Dec. 13, 1893, MS. Notes to Russia, VIII, 32, Moore, Dig., IV, 372.

It is to be observed that Art. VIII of the treaty with Mexico of Feb. 22, 1899, provides that after the demanding country has fulfilled specified requirements relative to requisition and documentary proofs, "the proper executive authority of the United States of America, or of the United Mexican States, as the case may be, shall then cause the apprehension of the fugitive." (Malloy's Treaties, I, 1187).

[71] The conventions of the United States providing for the provisional detention of fugitives are not uniform. Thus, for example, Art. IV of that with Chile of April 17, 1900, declares that the proper course in the United States shall be "to apply to a judge or other magistrate authorized to issue warrants of arrest in extradition cases and present a complaint on oath, as provided by the statutes of the United States" (Malloy's Treaties, I, 194). Others, such as Art. IV of the treaty with Cuba of April 6, 1904, provide that a complaint "shall be made by an agent" of the demanding government "before a judge or magistrate etc." (Malloy's Treaties, I, 369.) In certain other conventions, such as Art. IX of convention with Guatemala of February 27, 1903, it is declared that "each government shall endeavor to procure the provisional arrest of such criminal and to keep him in safe custody" for a specified period of time to await the production of documents upon which the claim for extradition is founded. (Malloy's Treaties, I, 882.) It is not believed that this provision is intended to contemplate the arrest of a fugitive in the United States save on a complaint under oath. Nevertheless, it is significant of what the political department believes to be a sufficient compliance with the existing law. When the United States agrees to procure the arrest of a fugitive, it seems to undertake by implication that its own officers shall, under certain contingencies, become the agents of the demanding government for the purpose of swearing to complaints.

countries.[72] While, therefore, a demanding state which had caused the provisional detention of a fugitive would lack the right to complain that its treaty was violated, if, upon its own failure to produce the requisition and documentary proofs within the time agreed upon after the date of arrest, the fugitive were released, it is not believed that the fugitive himself would, under similar circumstances, be necessarily entitled to his discharge from custody, if it appeared that the effort to secure his extradition was still being prosecuted in good faith by the state from whose territory he had fled.[73]

9. INTERPRETATION

Treaties of extradition are to be interpreted by the same processes that are applicable to other international agreements. There is always involved a two-fold inquiry: first, respecting the standard of interpretation; secondly, concerning the sources of interpretation.[74] Thus, in case of a dispute, proof that at the time of negotiation the contracting parties did in fact understand that a certain term had a particular signification, whatever that may be, should be decisive.[75] The observance by the courts of so-called rules of construction is not believed to be in defiance of this requirement. It simply indicates that, in the absence of evidence to the contrary, a single reasonable inference must be deduced from the conduct of the parties as expressed in their agreement. It does not signify that evidence showing a contrary understanding should be rejected or unheeded. When, however, under similar circumstances, there is habitual failure to offer such evidence, rules of construction

[72] See Mr. Bayard, Secy. of State, to Mr. Parkhurst, No. 18, Jan. 28, 1889, For. Rel. 1889, 50. 53. Moore, Dig., IV, 382; Mr. Moore, Assist. Secy. of State, to the Attorney-General. May 26, 1898, 227 MS. Dom. Let. 651, Moore, Dig., IV, 383. See also Moore, Extradition, I, 395–407.

[73] See comment of Prof. Moore, relative to a communication of Mr. Hill, Acting Secy. of State, to Mr. Aspiroz, Mexican Ambassador, No. 174, May 14, 1901, MS. Notes to Mexican Legation, X, 585, Moore, Dig., IV, 384.

[74] See "Concerning the Interpretation of Treaties," this JOURNAL, III, 46; also Wigmore, Evidence, IV, 3470.

[75] This is substantially the position taken by the United States as to the interpretation of its extradition treaty with Italy of February 8, 1868. See Moore, Extradition, I, § 141.

become more certain of application, and their true nature is obscured by reason of the frequency with which they are observed.[76]

When the municipal laws of a contracting state establish the procedure to be followed in extradition cases, in order to facilitate the operation of its treaties, it must be inferred that the requirements of those laws are had in contemplation at the time of negotiation, and that, in the absence of evidence to the contrary, there has been no attempt to nullify them by an undertaking inconsistent therewith. Thus, it is generally believed that the extradition treaties of the United States, however differing in scope and phraseology, are always concluded with reference to the existing Acts of Congress, and are therefore to be construed in harmony therewith, and that they, furthermore, necessarily indicate the construction placed upon the local laws by the Department of State.[77]

The Supreme Court of the United States is emphatic in its opinion that there should be imputed to the contracting parties the intention that a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way of the discharge of a contractual obligation expressed in an extradition treaty.[78]

[76] It may be observed that under certain circumstances a national court, as distinguished from an international tribunal, may feel itself fettered in the task of interpretation by the position taken by the political department of its own government, even subsequent to the time of negotiation. See Charlton *v.* Kelly, 229 U. S. 447, 476. Compare, *Ex parte* Charlton, 185 Fed. Rep. 880, 886.

[77] See Johnson *v.* Browne, 205 U. S. 309.

[78] See Grin *v.* Shine, 187 U. S. 181, 184, where Brown, J., speaking for a unanimous court declared:

"In the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign Powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, *viz.*, submit themselves to the laws of their country. Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders; but where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations. Presumably at least, no injustice is contemplated, and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community, is rather to be welcomed than discouraged."

See also Benson *v.* McMahan, 127 U. S. 457, 466–467; Wright *v.* Henkel, 190 U S.

Where a treaty lacks any specific reference to the matter, it is generally believed as a reasonable rule of construction that the agreement should take effect from the date of signature, and thus operate retroactively.[79]

40, 57; Pierce *v.* Creecy, 210 U. S. 387, 405. Holmes, J., in the opinion of the court in Glucksman *v.* Henkel, 221 U. S. 508, 512, declared:

"It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender."

See also United States *v.* Greene, 146 Fed. Rep. 766.

[79] See Moore, Extradition, I, § 86 where the learned writer says: "The principle that a treaty is not to be held to operate retroactively in respect to vested rights does not apply to conventions of extradition. It is a general principle that such conventions apply to offences committed prior to their conclusion, unless there is an express limitation. A fugitive has no vested right of asylum; nor does the provision in the Constitution of the United States against the enactment of *ex post facto* laws apply." Citing *In re* Angelo de Giacomo, 12 Blatchf. 391, also Mr. Evarts, Secy. of State, to Mr. Seward, Jan. 30, 1880; MSS. Dom. Let.

See also Mr. Hay, Secy. of State, to Mr. Aspiroz, Mexican Ambassador, No. 17, July 11, 1899, MS. Notes to Mexican Legation, X, 469, Moore, Dig., IV, 269, concerning date of taking effect of the extradition treaty with Mexico, February 22, 1899.

Most-Favored-Nation Clause. It is generally believed that extradition treaties do not fall within the most-favored-nation clause. See Cushing, Atty-Gen., 6 Op. 148, 155; Moore, Dig., V, 311.

Deserting Seamen. Numerous consular conventions and commercial treaties of the United States make provision for the surrender of deserting seamen through the intervention of consular officers. As the end sought to be accomplished and the procedure prescribed differ sharply from those which characterize extradition, the agreements of the United States have not been embraced in extradition conventions. The statutory law of the United States is, however, contained in the chapter on extradition.

Expenses. "Every treaty of extradition to which the United States is a party contains a provision that the expenses of extradition shall be borne by the demanding government, and it is the practice for the demanding government to defray the expenses of the proceedings whether the fugitive is eventually surrendered or not." (Frederick Van Dyne in Cyc. Law & Proc., XIX, 79.) For the texts of the provisions of the several extradition conventions of the United States see Malloy's Treaties. See also Moore, Extradition, Chap. XVIII, I, 598–610; Moore, Dig., IV, 408–411, and documents there cited.

Conviction par Contumace

The agreement expressed in numerous conventions [80] to deliver up persons convicted of crimes is interpreted both by the political and judicial departments of the United States as applicable solely to a fugitive whose conviction took place while he was in the custody of the demanding government.[81] In case the trial and conviction are subsequent to the escape of the accused, so that the judicial decree is *par contumace*, he is regarded as one merely charged with the commission of the crime. Hence in the judicial proceedings following the requisition for his surrender, such evidence of criminality must be offered as is required in any case of one charged with the commission of an extraditable offense.[82]

10. SCOPE OF TREATIES WITH RESPECT TO AREAS COVERED

The extradition treaties of the United States commonly declare that a person whose surrender may be demanded shall be either charged with or convicted of an offense committed in the "jurisdiction" of one of the contracting parties, and who seeks an asylum or who may be found within the "territories" of the other.[83]

The term jurisdiction appears to have been employed to designate any place lawfully subject to the control for purposes of jurisdiction of the demanding state at the time when the act was committed, such as a public vessel,[84] or a merchant vessel on the high seas,[85] as well as the na-

[80] See, for example Art. I of convention with Italy, March 23, 1868, Malloy's Treaties, I, 967; also Art. I of treaty with San Marino, Jan. 10, 1906, *id.*, II, 1598.

[81] See Mr. Blaine, Secy. of State, to the Minister of the Netherlands, May 6, 1889, relative to the case of C. E. Plugge, Moore, Extradition, I, 133; telegram of the Acting Secretary of State, to Mr. Leishman, Ambassador to Turkey, Oct. 10, 1907, For. Rel. 1907, II, 1070. See also *Ex parte* Fudera, 162 Fed. Rep. 591, in which the learned judge cites Moore, Extradition, § 102; "Report of a Recent Extradition Case, *re* Macaluso," Ills. L. R., VII, 237; *Ex parte* La Mantia, 206 Fed. Rep. 330.

[82] That this requirement has not always been appreciated by demanding governments is apparent from *Ex parte* Fudera, 162 Fed. Rep. 591, and *Ex parte* La Mantia, 206 Fed. Rep. 330.

[83] See, for example, Art. I, treaty with Brazil, May 14, 1897, Malloy's Treaties, I, 147.

[84] See President Adams, to Mr. Pickering, Secy. of State, May 21, 1799, relative to the case of one Nash, alias Robbins, 8 John Adams's Works, 651, Moore, Dig., IV, 281–282; Moore, Extradition, §§ 105 and 106, concerning the cases respectively of Kent and of Markham.

[85] See Cushing, Atty-Gen., 8 Op. 73, 84. See also Mr. Buchanan, Minister to

tional domain.[86] On the other hand, an offense perpetrated by a citizen of a demanding state in foreign territory not subject to its control, is not believed to have been committed within the jurisdiction of that state, even though it asserts the right to punish the offender for his misconduct as an act in defiance of its own commands.[87]

The term "territories" as descriptive of the place where a fugitive seeks asylum or is found, is regarded as referring to a place subject to the control of the state upon which requisition is made, such as its own domain, or foreign territory under its military occupation,[88] or a foreign merchant vessel within its harbors,[89] or its own public vessels. Difficulties that may arise respecting the surrender of the fugitive when

England, to Mr. Marcy, Secy. of State, Aug. 3, 1855, 67 MS. Despatches from Great Britain, Moore, Dig., IV, 282.

In a case of concurrent jurisdiction, such as, for example, where an offense was committed on a merchant vessel of the demanding state on the high seas, resulting in the death of the victim after the vessel reached a port of the state on which requisition was made, the latter would doubtless be justified in asserting itself the right to prosecute the offender, and in declining to surrender him, if its authorities saw fit to take such a course. See Mr. Fish, Secy. of State, to Mr. Watson, Aug. 15, 1874, MS. Notes to Great Britain, XVI, 413, Moore, Dig., IV, 281. See also Sternaman *v.* Peck, 83 Fed. Rep. 690. Compare situation in case of Peter Lynch, Moore, Extradition, I, § 107.

[86] See the decision of Lowell, J. in *re* Taylor, 118 Fed. Rep. 196, and the comment thereon in Moore, Dig., IV, 280.

[87] See Williams, Atty-Gen., 14 Op. 281, *re* Case of Carl Vogt; Compare *In re* Stupp, 11 Blatch. 124.

"It has been announced by the Department of State that an offence committed in a country where extraterritorial jurisdiction is exercised by foreign Powers is not committed within the jurisdiction of such Powers in the sense of the extradition treaties, so as to give the government of the country of which the offender is a citizen or subject the right to demand his surrender from the territory of the United States," (Moore, Extrad. I, § 108) quoting Mr. Cadwalader, Acting Secy. of State, to Mr. Bingham, American Minister to Japan, Aug. 18, 1875, For. Rel. 1875, II, 821.

[88] See report of Jan. 9, 1900, Magoon's Reports, 523, Moore, Dig., IV, 285; letter of the Secy. of War, Aug. 17, 1900, quoted in Mr. Hill, Acting Secy. of State, to Mr. Aspiroz, Mexican Ambassador, No. 101, Sept. 4, 1900, MS. Notes to Mexican Legation, X, 537, Moore, Dig., IV, 285.

It is not believed that the term "territories" has reference to a foreign country where rights of extraterritorial jurisdiction are exercised by the state on which requisition is made. See Mr. Hunter, Second Assist. Secy. of State, to Mr. G. F. Seward, Consul-General, Aug. 31, 1874, For. Rel. 1874, 338; Mr. Cadwalader, Assist. Secy. of State, to same, Oct. 23, 1874, *id.*, 347; Moore, Extradition, I, § 109.

[89] See *In re* Newman, 79 Fed. Rep. 622.

he is found on a public vessel,[90] or concerning his arrest when he is on board a foreign merchant vessel in a port of the state upon which requisition is made,[91] are unrelated to the question as to whether the case falls within the scope of the treaty. If it does, any problem relating to surrender is always capable of adjustment.

11. FUGITIVES FROM JUSTICE

The treaties of the United States are deemed to apply "not only to persons seeking an asylum here professedly, but to such as may be found in the country." [92] The reasons that may induce offenders to enter are unimportant.[93] There is, however, a disposition on the part of the United States to make the requirement that the person found within its territories shall have entered therein after having been himself within the "jurisdiction" of the state demanding his surrender. Consequently,

[90] See Mr. Blaine, Secy. of State, to Mr. Denby, Minister to China, No. 680, Dec. 7, 1891, For. Rel. 1892, 74, Moore, Dig., IV, 283.

[91] See Mr. Lincoln, Minister to England, to Mr. Blaine, Secy. of State, No. 480, June 24, 1891, MS. Despatches from England, Moore, Dig., IV, 284.

DOMESTIC LEGISLATION FOR EXTRADITION TO FOREIGN TERRITORY UNDER MILITARY OCCUPATION. The enactment by a state of a law such as the amendment by Congress of June 6, 1900 of § 5270 R. S., providing for the arrest within its territory of persons found therein after having violated certain criminal laws within foreign territory occupied by or under the control of the state, and establishing appropriate procedure for the surrender of such persons to the military governor of such territory, is merely an assertion of a right of jurisdiction by the sovereign in actual control of the place of refuge, and that also where the crime was committed. It is not based upon treaty. Nor is it responsive to any international obligation. In so far as the law of nations is concerned such legislation is essentially domestic in character. See Neely *v.* Henkel, 180 U. S. 109, in which the Act of June 6, 1900, was applied to Cuba, while occupied by the United States. See also Mr. Hay to Mr. von Mumm, Oct. 25, 1899, For. Rel. 1899, 318–319, Moore, Dig., IV, 265–266.

The Panama Canal Act of August, 1912, extends the operation of the extradition treaties of the United States to the territory embraced within the Isthmian Canal Zone. (Session Laws, 62 Cong., 2 Sess., 1912, p. 569.)

[92] The language in the text is that employed in the caption of the opinion by Cushing, Atty-Gen., 8 Op. 306, cited in Moore, Dig., IV, 286.

[93] See J. B. Moore, as to the case of Salvadorean refugees, Am. L. Rev. XXIX, 1, 5, where the learned writer declares that "There is no requirement in the treaties that the individual whose surrender is demanded shall have 'fled' from justice, and nothing is more common than to deliver up under their stipulations persons who are not fugitives in fact." See also *In re* Ezeta, 62 Fed. Rep. 972, 978.

a person who while in the United States and without leaving its domain, participated in a conspiracy to commit murder in a foreign state, within whose territory the conspiracy was carried into effect, would not be regarded as liable to extradition upon the demand of that state.[94]

CHARLES CHENEY HYDE.

[94] See Mr. Hay, Secy. of State, to Baron Fava, Italian Ambassador, No. 654, March 8, 1901, MS. Notes to Italian Legation, IX, 508, Moore, Dig., IV, 286.

THE PAN AMERICAN ORIGIN OF THE MONROE DOCTRINE

So much has been written regarding the origin of the Monroe Doctrine and on the supposed effects of the various causes contributing to its origin, toward its application at various times to different situations, that the only excuse that can be offered for discussing this phase of it must be to cover it from some fresh point of view.

The distinguished Peruvian diplomatist and author, Dr. Anibal Maúrtua, on page 20 of his book *La Idea Panamericana y la cuestión de Arbitraje*, published in Lima in 1901, refers to President Monroe's message of December 2, 1823, announcing the Monroe Doctrine, as a "Pan-American Declaration." The great Argentine international jurist, Carlos Calvo, called it "declaratory of complete American independence," and the Peruvian author, Carlos Arenas y Loayza, states in his excellent monograph on the Monroe Doctrine, published in Lima in 1905, that "the Monroe Doctrine is linked with our past and with our present, and gives us the key of the future of these Republics, considered in relation to the events of our times and the indications of the future; which republics, extending over the same continent, form one sole body, are called on to have one and the same spirit and to work in accord, in edifying friendship for justice and peace on earth."

Whence comes this Pan American nature of the Monroe Doctrine? It comes from its Pan American origin.

In the instructions of Secretary Monroe to Alexander Scott, agent of the United States of America to Venezuela, dated May 14, 1812, we find the following statement:

> The United States are disposed to render to the Government of Venezuela, in its relations with foreign Powers, all the good offices that they may be able. Instructions have been already given to their Ministers at Paris, St. Petersburg, and London, to make known to those Courts that the United States take an interest in the independence of the Spanish Provinces.

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The next link in the chain occurs in July, 1821, two years and six months before the famous Doctrine was actually issued, in a despatch from Mr. Thomas L. L. Brent, American chargé d'affaires at Madrid, to the Secretary of State, dated July 10, 1821:

> As far as I have been able to form an opinion, it is, that the foreign Powers, during the agitation of the American question, have endeavored to prevent any arrangement between the parties.
>
> On the 9th of July, Mr. Brent had an interview with Mr. Ravenga, one of the commissioners of Bolivar, at Mr. Ravenga's request.
>
> He calculated, he said, upon the friendship of the United States to promote the independence of the Republic of Colombia; he had a full conviction that he could rely upon it. Mr. Monroe, when Secretary of State, had informed him that all the Ministers of the United States in Europe had instructions to advance the acknowledgment of their independence by foreign Powers.
>
> I sympathized with him in the unpleasant situation in which he was placed, and feared that the sentiment in Spain was not as favorable as could be desired. He was perfectly justified, I said, in relying upon the good dispositions of the United States. It was their interest and their sincere wish that the acknowledgment of the independence of South America should be accelerated. The United States had not only been more forward than any other Power in publishing to the world their wishes with respect to her, but had accompanied them with actions, which certainly afforded the best proof of their sincerity; and among them, I adverted to the message of the President to the Congress of the United States at the commencement of its last session, in which, alluding to the proposed negotiation between the late colonies and Spain, the basis of which, if entered upon, would be the acknowledgment of their independence, he says—"To promote that result by friendly counsels, including Spain herself, has been the uniform policy of the Government of the United States."
>
> The friendship of the United States, he said, was very grateful to the Republic of Colombia, and he hoped and expected that, at the commencement of the next meeting of Congress, the acknowledgment of its independence would be decided upon; the moment had arrived when all the Powers of the world would see the propriety of it. He calculated that the United States would be the first to take this step; hoped to see a confederacy of republics through North and South America, united by the strongest ties of friendship and interest; and he trusted that I would use my exertions to promote the object he so much desired.
>
> I heartily concurred with him in the hope that all governments would resolve to adopt a measure so conformable to justice; joined with him

in the agreeable anticipations of the progress of free principles of government, of the intimate union and brilliant prospects of the states of our new world. I presumed, I said, it was not necessary to bring to his mind the high interest felt by the United States in their welfare—an interest in which I deeply participated, and desired, as much as he possibly could, the happiness of our Spanish American brethren. What would be the determination of the United States at the period of the commencement of Congress, it was impossible for me to foresee; whether they would consider it a seasonable moment for doing that which was so much desired, was a point I could not resolve.

Six months later a request came from the first Latin American minister ever received by the United States of America, Manuel Torres, of Colombia (see the article on the "Pan Americanism of Henry Clay" in the *Bulletin of the Pan American Union*, May, 1913), for the United States to announce the Monroe Doctrine:

The glory and the satisfaction of being the first to recognize the independence of a new republic in the south of this continent belongs, in all respect and considerations, to the Government of the United States. The present political state of New Spain requires the most earnest attention of the Government of the United States. There has occurred a project, long since formed, to establish a monarchy in Mexico, on purpose to favor the views of the Holy Alliance in the New World; this is a new reason which ought to determine the President of the United States no longer to delay a measure which will naturally establish an American Alliance, capable of counteracting the projects of the European Powers, and of protecting our republican institutions. My government has entire confidence in the prudence of the President, in his disposition to favor the cause of the liberty and of the independence of South America, and his great experience in the management of public business.—(17th Congress, 1st Session, No. 327—Manuel Torres to the Secretary of State, Philadelphia, Nov. 30th, 1821.)

It will be noted that this was written over two years before the Monroe Doctrine was actually declared on December 2, 1823.

The following extract from an instruction from Secretary of State John Quincy Adams to the first United States minister to Colombia, Richard C. Anderson, dated May 27, 1823, six months before the declaration of the Monroe Doctrine, continues the trend of events:

The Colombian Government, at various times, have manifested a desire that the United States should take some further and active part

in obtaining the recognition of their independence by the European Governments, and particularly by Great Britain. This has been done even before it was solicited. All the Ministers of the United States in Europe have for many years been instructed to promote the cause, by any means consistent with propriety, and adapted to their end, at the respective places of their residence. The formal proposal of a concerted recognition was made to Great Britain before the Congress of Aix-la-Chapelle. At the request of Mr. Torres, on his dying bed [he died July 15, 1822, at Philadelphia], and signified to us after his decease, Mr. Rush was instructed to give every aid in his power, without offense to the British Government, to obtain the admission of Mr. Ravenga [see Mr. Brent's despatch regarding Mr. Ravenga, printed above]; of which instruction, we have recent assurances from Mr. Rush that he is constantly mindful. Our own recognition, undoubtedly, opened all the ports of Europe to the Colombian flag, and your mission to Colombia, as well as those to Buenos Aires and Chile, cannot fail to stimulate the cabinets of maritime Europe, if not by the liberal motives that influenced us, at least, by selfish impulses, to a direct, simple and unconditional recognition. We shall pursue this policy steadily through all the changes to be foreseen, of European affairs. There is every reason to believe that the preponderating tendency of the war in Spain, will be to promote the universal recognition of the South American Governments, and at all events, our course will be to promote it by whatever influence we may possess.

In this connection the following extract from a letter from Lafayette to Henry Clay, dated December 29, 1826, is interesting:

How do you find Mr. Canning's assertion in the British Parliament, that he, Mr. Canning, has called to existence the new Republics of the American Hemisphere? when it is known by what example, what declaration, and what feelings of jealousy the British Government has been dragged into a slow, gradual, and conditional recognition of that independence. (Vol. IV, page 154, Works of Clay, 1856 edition.)

From the foregoing it will be deduced that—

(1) The South Americans *asked for* the Monroe Doctrine;

(2) Their doing so gave it, from its inception, a Pan American nature;

(3) Their asking for it furnishes an additional argument for its purely American, as contrasted with its supposedly Americo-British, origin.

(4) Such early action on the part of Latin America should not be lost sight of in present day applications of the Monroe Doctrine.

The following quotation from a pamphlet published in 1902 by the

late William L. Scruggs, formerly United States minister to Colombia and Venezuela, supports the foregoing sentiments of Lafayette:

It has been said, and repeated often enough to gain some degree of credence, that the first suggestion of the Monroe Doctrine had an European origin. The claim is that the British Premier, Mr. Canning, suggested it to Mr. Rush, during their personal conference in September, 1823, relative to the designs of the so-called "Holy Alliance" upon the newly enfranchised Spanish-American republics.

The absurdity of this claim is too manifest for serious consideration. In the first place, the Canning-Rush conference did not take place until two months *after* the date of Mr. Adams' note to Mr. Rush nor until a month and a half after Mr. Adams' oral declarations to the Russian Minister. Hence the impossibility that the suggestion could have come from Mr. Canning and at the time and place indicated; and it has never been intimated, much less asserted, that it came from him at any time prior to that. In the second place, we have Mr. Canning's own words in refutation of the claim, which, in the absence of rebutting evidence, ought to be conclusive. In a letter addressed to the British Minister at Madrid, dated December 21, 1823 (see Stapleton's *Canning and his Times*, p. 395; Wharton's Digest, Sec. 57) he uses this language:

"Monarchy in Mexico and Brazil would cure the evils of universal democracy, and prevent the drawing of a demarcation which I most dread, America versus Europe."

And further on, in the same letter, speaking of his conference with Mr. Rush, he says: "While I was yet hesitating, in September last, what shape to give the proposed declaration and protest" (against the designs of the Holy Alliance) "I *sounded* Mr. Rush, the American Minister here, as to his powers and disposition to join in any step which we might take to prevent a hostile enterprise by European powers against Spanish America. He had no powers; but he would have taken upon himself to join us if we would have begun by recognizing the independence of the Spanish-American States. This we could not do, and so we went on without. But I have no doubt that his report to his Government of this sounding, which he probably represented as an overture, had something to do in hastening the explicit declaration of the President."

This letter, it will be observed, was written nineteen days after the date of Mr. Monroe's message to Congress.

The point is that Mr. Canning deliberately placed himself on record as opposed to the Doctrine enunciated in both the message and the note, and hence could not have inspired either.

CHARLES LYON CHANDLER.

THE DECLARATION OF LONDON OF FEBRUARY 26, 1909

PART II *

UNNEUTRAL SERVICE

Chapter 3, devoted to unneutral service, has only three articles; but they are important and were debated perhaps with more spirit than any other articles of the Declaration. The general subject is one which has been treated by Lord Stowell in a series of masterly judgments, and it is believed that an examination of two or three of them would form the best introduction to this chapter.

In the case of the *Carolina* (4 C. Robinson, 256), decided in 1802, a Swedish vessel captured at the taking of Alexandria and lost, while in the possession of the captors, by accident and stress of weather, before the validity of the capture was passed upon by the court, had served as a transport in the French expedition to Alexandria and, upon suit brought by its owners, Lord Stowell said:

> If an act of force, exercised by one belligerent on a neutral ship or person, is to be deemed a sufficient justification for any act done by him, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If any loss is sustained in such service, the neutral yielding to such demands, must seek redress against the Government that has imposed the restraint upon him. He has no right to expect that the *British* Government should pay for the injustice of its public enemy. If this vessel had been taken in *delicto*, I should have felt no hesitation in saying, that she must have been subject to condemnation. Whether the troops were received on board voluntarily, or involuntarily, could make no difference.[59]

In the case of the *Friendship* (6 C. Robinson, 420), decided in 1807, an American ship was engaged as a transport in the military service of the enemy. In addition to a small cargo, there were ninety passengers,

* The first part of this article appeared in the April 1914 JOURNAL, pp. 274–329.

[59] 4 C. Robinson, 260.

of whom one was an American, five French merchants, and the rest French military officers and mariners. To the objection that the French passengers were not transported for a specific active service of the enemy, his lordship said:

> The substance of the thing is this, whether they are vessels hired by the agents of the Government, for the purpose of conveying soldiers or stores in the service of the state? That is the substance; and it signified nothing whether the men so conveyed are to be put into action on an immediate expedition or not. The mere shifting of draughts in detachments, and the conveyance of stores from one place to another, is an ordinary employment of transport vessels, and it is a distinction totally unimportant, whether this or that case may be connected with the *immediate active service* of the enemy. In removing forces from distant settlements, there may be no intention of immediate action: but still the general importance of having troops conveyed to places, where it is convenient that they should be collected, either for present, or future use, is what constitutes the object and employment of transport vessels.[60]

And in a later passage of the same judgment, his lordship says:

> Under these circumstances, I am of opinion that this vessel is to be considered as a *French* transport. It would be a very different case if a vessel appeared to be carrying only a few individual *invalided* soldiers, or discharged sailors, taken on board by chance, and at their own charge. Looking at the description given of the men on board, I am satisfied that they are still as effective members of the *French* marine as any can be. Shall it be said then that this is an innoxious trade, or that it is an innocent occupation of the vessel? What are arms and ammunition in comparison with men, who may be going to be conveyed, perhaps, to renew their activity on our own shores? They are persons in a military capacity, who could not have made their escape in a vessel of their own country. Can it be allowed that neutral vessels shall be at liberty to step in and make themselves a vehicle for the liberation of such persons, whom the chance of war has made, in some measure, prisoners in a distant port of their own colonies in the *West Indies?* It is asked, will you lay down a principle that may be carried to the length of preventing a military officer, in the service of the enemy, from finding his way home in a neutral vessel from *America* to *Europe?* If he was going merely as an ordinary passenger, as other passengers do, and at his own expense, the question would present itself in a very different form. Neither this Court, nor any other *British* Tribunal has ever laid down the principle to that extent. This is a case differently composed. It is the case of a vessel letting herself out in a distinct manner, under a contract with the

[60] 6 C. Robinson, 426.

enemy's government, to convey a number of persons, described as being in the service of the enemy, with their military character travelling with them, and to restore them to their own country in that character. I do with perfect satisfaction of mind, pronounce this to be a case of a ship engaged in a course of trade, which cannot be considered to be permitted to neutral vessels, and without hesitation pronounce this vessel subject to condemnation.[61]

In the case of the *Orozembo* (6 C. Robinson, 430), decided in the same year, it appears that an American vessel, chartered by a merchant at Lisbon, was, to quote the language of the report, "fitted up for the reception of three military officers of distinction, and two persons in civil departments in the government of *Batavia*, who had come from *Holland* to take their passage to *Batavia*, under the appointment of the Government of *Holland*. There were also on board a lady, and some persons in the capacity of servants, making on the whole seventeen passengers." On the question of numbers and of the knowledge of the character of the persons so transported on the part of the master or owner, Sir William Scott said:

What is the number of military persons that shall constitute such a case, it may be difficult to define. In the former case there were many, in the present there are much fewer in number; but I accede to what has been observed in argument, that number alone is an insignificant circumstance in the considerations, on which the principle of law on this subject is built; since fewer persons of high quality and character may be of more importance, than a much greater number of persons of lower condition. To send out one veteran general of *France* to take the command of the forces at *Batavia*, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater; and therefore it is what the belligerent has a stronger right to prevent and punish. In this instance the military persons are three, and there are, besides, two other persons, who are going to be employed in civil capacities in the government of *Batavia*. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me, *on principle*, to be but reasonable that, whenever it is of sufficient importance to the enemy, that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel, that may be let out for a purpose so intimately connected with the hostile operations. * * *

[61] 6 C. Robinson, 428–9.

It has been argued throughout, as if the ignorance of the *master alone* would be sufficient to exempt the property of the owner from confiscation. But may there not be other persons, besides the master, whose knowledge and privity would carry with it the same consequences? Suppose the owner himself had knowledge of the engagement, would not that produce the *mens rea*, if such a thing is necessary? or if those who had been employed to act for the owner, had thought fit to engage the ship in a service of this nature, keeping the master in profound ignorance, would it not be just as effectual, if the *mens rea* is necessary, that it should reside in those persons, as in the owner? The observations which I shall have occasion to make on the remaining parts of this case will, perhaps, appear to justify such a supposition, either that the owner himself, or those who acted for him in *Lisbon* or in *Holland*, were connusant of the nature of the whole transaction. But I will first state *distinctly*, that the principle on which I determine this case is, that the carrying military persons to the colony of an enemy, who are there to take on them the exercise of their military functions, will lead to condemnation, and that the Court is not to scan with minute arithmetic the number of persons that are so carried. If it has appeared to be of sufficient importance to the Government of the enemy to send them, it must be enough to put the adverse Government on the exercise of their right of prevention; and the ignorance of the master can afford no ground of exculpation in favour of the owner, who must seek his remedy in cases of deception, as well as of force, against those who have imposed upon him.[62]

In the case of the *Atalanta* (6 C. Robinson, 440), decided in 1808, the same eminent judge held, upon an elaborate review of authorities, that the carriage of despatches of the enemy affecting the war was unneutral conduct and as such punishable. In the course of his judgment his lordship said:

The question then is, what are the legal consequences attaching on such a criminal act? for that it is criminal and most noxious is scarcely denied. What might be the consequences of a *simple* transmission of dispatches, I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a *fraudulent* case. That the simple carrying of dispatches, between the colonies and the mother country of the enemy, is a service highly injurious to the other belligerent, is most obvious. In the present state of the world, in the hostilities of *European* powers, it is an object of great importance to preserve the connection between the mother country and her colonies; and to interrupt that connection, on the part of the other belligerent, is

[62] 6 C. Robinson, 433–6.

one of the most energetic operations of war. The importance of keeping up that connection, for the concentration of troops, and for various military purposes, is manifest; and I may add, for the supply of civil assistance also, and support, because the infliction of civil distress, for the purpose of compelling a surrender, forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of these dispatches might relate only to the civil wants of the colony, and that it is necessary to show a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered, in the contemplation of law, as an object of hostility, although not produced by operations strictly military. How is this intercourse with the mother country kept up, in time of peace? by ships of war, or by packets in the service of the state. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does, in fact, place himself in the service of the enemy-state, and is justly to be considered in that character. Nor let it be supposed, that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of dispatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other belligerent in that quarter of the world. It is true, as it has been said, that *one ball* might take off a *Charles* the XIIth, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that in the contemplation of human events, it is a sort of evanescent quantity of which no account is taken; and the practice has been *accordingly*, that it is in considerable quantities only that the offense of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size, as not to be capable of producing the most important consequences in the operations of the enemy: It is a service therefore which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature.[63]

We are now prepared to consider briefly the provisions of the chapter. The first article (Article 45) reads as follows:

A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:

(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed

[63] 6 C. Robinson, 454–5.

forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy.

(2) If, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation.

The provisions of the present article do not apply if the vessel is encountered at sea unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities or a neutral port subsequently to the notification of the outbreak of hostilities to the power to which such port belongs, provided that such notification was made in sufficient time.

Condemnation follows, because the vessel, although in the employ and control of the neutral, nevertheless knowingly and in violation of neutral duty, directly aids and abets the enemy. As condemnation is permissible in such case, it is easily comprehended that condemnation follows where the neutral vessel under the exclusive control of the enemy takes a direct part in the hostilities. The vessel has ceased to be neutral in any fair sense of the word, and is properly assimilated to enemy property and shares its fate.

Article 46

A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel:

(1) If she takes a direct part in the hostilities.

(2) If she is under the orders or control of an agent placed on board by the enemy government.

(3) If she is in the exclusive employment of the enemy government.

(4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

In the cases covered by the present article, goods belonging to the owner of the vessel are likewise liable to condemnation.

But it may happen that a neutral unwittingly does a service to the enemy: for example, the vessel has on board an individual embodied in the armed forces of the enemy. In such a case the individual in question

may be removed from the vessel and made a prisoner of war, even although there be no ground for the capture of the vessel. This case suggests that of the *Trent*, although it is not identical, because Mason and Slidell formed no part of the military forces of the enemy. In speaking of the relation between the provisions of the article and the action of the American Government in removing Mason and Slidell from the *Trent*, a British and therefore a neutral vessel, during the Civil War, Mr. Root, in an address on the Declaration of London, felt justified in saying that

> It is also interesting that the question so much discussed at the time of the *Trent* affair between England and the United States has been disposed of by the provision of Article 47 that "any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there may be no ground for the capture of the vessel."
>
> This by implication excludes civil agents such as Mason and Slidell from capture but approves the method followed by Captain Wilkes in taking persons assumed to be liable to capture from the vessel and releasing the vessel.[64]

It should be said, before leaving the article, that the United States was strongly opposed to this provision, holding that, if the capture of the individual did not justify the seizure and condemnation of the vessel, he should not be removed from it. The whole proceeding calls up unpleasant memories of visit and search; but as the Conference was set upon the article and urged the American delegation to accept it, the United States yielded in the interest of unanimity.

DESTRUCTION OF NEUTRAL PRIZES

Chapter 4 of the Declaration deals with the destruction of neutral prizes, a subject discussed at great length, with much feeling and with some bitterness of expression at the Second Hague Peace Conference, which, however, was unable to reach an agreement upon the propriety or illegality of the destruction of neutral property captured upon the high seas, or within the territorial waters of the enemy. The enemy prize may be sunk or destroyed, but as title passes to neutral property

[64] Proceedings of American Society of International Law, 1912, p. 9.

only by the decision of a prize court, it seems unjustifiable and questionable in practice to destroy the property of the neutral merely because its possession encumbers the belligerent. If preservation of the property hampers naval operations or is otherwise burdensome, the simplest solution is found in its release. At least such was the opinion and advice of the British and American delegations at the Second Hague Conference, but some of the Continental Powers stood upon the extreme belligerent right of destruction or sought to create and justify it, if it could not be said generally to exist. The question is far from academic, because the right to destroy neutral prizes is claimed by some of the greatest and most enlightened Powers, and the right itself was exercised, to the annoyance of neutrals, by Russia in its recent war with Japan. Thus, to cite but a single example, a British ship, the *Knight Commander*, on its voyage from New York to Japan, was stopped by a Russian cruiser on July 23, 1904. Her cargo, consisting largely of railway material, was regarded as contraband; the ship's papers and the crew were removed, and the vessel was sunk by the cruiser. The official justification for this action was stated as follows: "The proximity of the enemy's port, the lack of coal on board the vessel to enable her to be taken into a Russian port, and the impossibility of supplying her with coal from one of the Russian cruisers, owing to the high seas running at the time, obliged the commander of the Russian cruiser to sink her." [65]

This action was in accordance with Article 21 of the Russian Regulations as to Naval Prize, which authorize a commander to destroy the prize "in exceptional cases, when the preservation of a captured vessel appears impossible on account of her bad condition or entire unworthiness, the danger of her recapture by the enemy, or the great distance or blockade of ports, or else on account of danger threatening the ship which has made the capture, or the success of her operations." [66]

Geography is pressed into service by some nations to justify the destruction of neutral prizes, as it is difficult and said to be impossible in certain cases to take the vessel into a port of the home country, to have the validity of the capture passed upon by a prize court. Thus, the

[65] The account of this case and the law on the question are taken from Professor Holland, Letters on War and Neutrality, 2d ed., 1914, pp. 161–170.

[66] Holland, Letters on War and Neutrality, 2nd ed., p. 161.

distinguished Russian publicist, the late Frederic de Martens, says in his treatise on international law that

> Given the great distance between Russian ports on the principal seas and on the ocean, the vessels that Russia may have occasion to send on cruises will often be obliged to sink their prizes. This measure of a general nature will undoubtedly bring upon our country the displeasure of the world at large.
>
> In effect, what the maritime law of all States considers a measure to be resorted to only in the last extremity necessarily becomes with us the normal rule. This fact increases the responsibility of Russia with respect to neutrals, and it follows that the Russian Government must select with extreme care the officers entrusted with the command of its cruisers.[67]

Whether or not the learned publicist was correct in laying down the destruction of neutral prizes as essential to his country in naval warfare, he showed himself gifted with the power of prophecy when he declared that "this measure of a general nature will undoubtedly bring upon our country the displeasure of the world at large." It must be admitted, however, that he has respectable authority for his contention. Thus, in the instructions issued by France in 1870 and by the United States in 1898, and in the Naval War Code of the United States, promulgated on June 7, 1900, and revoked four years later, destruction of neutral prizes was permitted in extreme cases; but the exercise of the right was subordinated to the indemnification of the neutrals. Destruction is, however, forbidden by Great Britain and Japan, and the American delegations to the Second Hague Conference and to the Naval Conference at London were instructed to oppose in all cases and under all circumstances the destruction of neutral prizes. The great authority of Lord Stowell, whose decisions are looked upon as law by the United States and Great Britain, and are treated with great respect by Continental jurists, has been invoked on both sides of the question. His views have been accurately and briefly summarized by Professor Holland, who says:

> The statement of these rules by Lord Stowell, who speaks of them as "clear in principle and established in practice," may * * * be summarized as follows: An enemy's ship, after her crew has been placed in safety, may be destroyed. Where there is any ground for believing

[67] De Martens, *Traité de Droit International*, Vol. 3, pp. 298–9.

that the ship, or any part of her cargo, is neutral property, such action is justifiable only in cases of "the gravest importance to the captor's own State," after securing the ship's papers and subject to the right of neutral owners to receive full compensation (*Actæon*, 2 Dods. 48; *Felicity*, *ib.* 381; substantially followed by Dr. Lushington in *Leucade*, Spinks, 221.) [68]

In view of these authorities, it cannot be said that the destruction of neutral prizes was forbidden by international law, although we are justified in maintaining that the practice is so abhorrent in principle and so open to abuse that it should be not only condemned but rejected. We cannot, however, close our eyes to the fact that self-preservation is a law unto itself and that nations will invoke self-preservation in the teeth of an international agreement, however carefully drawn and solemnly promulgated. The Naval Conference acted wisely, it is believed, when it controlled and regulated the exercise of a right which it could not abolish. It was universally admitted that the non-destruction of neutral prizes was the rule and that their destruction should be the exception, with the distinct proviso that the necessity of the act should be established, its validity passed upon in a judicial proceeding, and that the neutral should in any event be fully indemnified.

The rule is thus stated in Article 48:

A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.

Article 49 states the exception:

As an exception, a neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time.

But it will be noted that the vessel destroyed must be liable to condemnation, and in addition to the proof required to establish this contention the captor must establish as a fact that the failure to destroy the prize would endanger the safety of the warship or the success of the naval

[68] Holland, Letters on War and Neutrality, 2d ed., pp. 163–4.

operations. As said by the learned reporter, "It is, of course, the situation at the moment when the destruction takes place which must be considered in order to decide whether the conditions are or are not fulfilled."

That this interpretation of the article is correct is clear from Article 51, which says that

> A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity, of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested, and no examination shall be made of the question whether the capture was valid or not.

It is therefore evident that the burden of proof is shifted from the neutral to the captor, and that the latter must justify his action by proving danger to the vessel and to the success of the military operation in which he was engaged, without considering whether or not the neutral was at fault. There is, therefore, no connection between the action of the captor and the conduct of the neutral; the captor must depend upon the strength of his own, not upon the weakness of the neutral's, case. A failure to establish the facts which constitute the exception to the general rule renders *ipso facto* the captor liable to the neutral, and the validity of the capture will be neither considered nor passed upon by the court. If, however, "the act of destruction has been held to have been justifiable," to quote the language of Article 52, that is to say, if the facts constituting the exception have been made out, the question of the propriety of the capture, based upon the conduct of the neutral, is then considered for the first time; and, if the capture of the vessel which has been destroyed, is held to be invalid in a judicial proceeding and according to the principles of law, "the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled" had the vessel been taken into a port, as is the rule, instead of being destroyed, as is the exception. In the same way, neutral goods not liable to condemnation, which have been destroyed with the vessel, must be paid for by the captor, as by the express provision of Article 53, "the owner of such goods is entitled to compensation."

But these provisions would be unavailing, if the captor were not re-

quired to remove from the neutral vessel and to lay before the court "all the ship's papers and other documents which the parties interested consider relevant, for the purpose of deciding on the validity of the capture" (Article 50), and humanity would be shocked unless, "before the vessel is destroyed all persons on board must be placed in safety," as is required by the same article. It is thus seen that the right to destroy a neutral prize, instead of bringing it into court, is conditioned upon the presence of exceptional conditions, which must be found to exist at the time of the destruction, and that all necessary and reasonable safeguards are devised for the neutral's protection.

But this is not all, for it may be that but a fraction of the cargo is subject to seizure and confiscation, in which event the innocent would suffer with the guilty, if the vessel were seized and the voyage broken. It is therefore wisely provided in Article 54 that

> The captor has the right to demand the handing over, or to proceed himself to the destruction, of any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel herself liable to condemnation.

If the captor has demanded and the goods have been handed over to him, the vessel has, as it were, purged itself of the offense, and "the master must be allowed to continue his voyage." But the captor is not to pass upon the legality of his action. He must place the vessel in a position to contest its legality, and he must provide himself with the proof necessary to enable a court to determine it. Thus, to quote the text of Article 54, "The captor must enter the goods surrendered or destroyed in the log-book of the vessel stopped, and must obtain duly certified copies of all relevant papers." And in the proceeding to test the validity of the captor's action, the article specifically provides that "The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable."

On this point the official report says:

> The reasons for which the right to destroy the vessel has been recognized may justify the destruction of the contraband goods, the more so as the considerations of humanity which can be adduced against the destruction of a vessel do not in this case apply. Against arbitrary de-

mands by the cruiser there are the same guaranties as those which made it possible to recognize the right to destroy the vessel. The captor must, as a preliminary, prove that he was really faced by the exceptional circumstances specified; failing this, he is condemned to pay the value of the goods handed over or destroyed, and the question whether they were contraband or not will not be gone into.[69]

It is believed that the provisions of this chapter are a happy compromise between the apparently irreconcilable contentions that a right to destroy a neutral prize does not exist, and that such a right does exist, and the Conference is to be congratulated upon producing order and harmony from chaos.

TRANSFER TO A NEUTRAL FLAG

International law as at present understood and practised subjects to capture innocent property of the enemy upon the high seas, whether the property belongs to the state or to its citizens and subjects. On the other hand, the property of neutrals, unless it is contraband or destined to a blockaded port, is exempt; but the desire of the merchant to protect his goods from seizure and confiscation often leads him to invest them with a neutral character which they do not in fact possess. Sales before the war are legitimate, and the policy of the law is and should be to protect them. Sales in anticipation of war are more questionable, because the enemy feels that he is thus prevented from intercepting commerce which, had it not been transferred, he might capture and by so doing exert a pressure in favor of peace, if war has not actually broken out, or shorten the war, if its exists, by means of the anxiety natural to merchants to save their ventures from capture. It may well be doubted whether the pressure is not more specious than real, because it is believed that nations and their citizens or subjects are not in the frame of mind either before war or after its outbreak to yield to argument and the appeal to reason. If the capture of enemy property is to be effective, the belligerent must possess the right to visit the suspected vessel and to determine its nationality and to search the cargo, in order to decide whether it is in effect innocent.

[69] Treaties, Conventions, etc., Vol. 3 (Charles), p. 311.

It becomes, therefore, a matter of great importance to determine whether the transfer occurred before the war and was in good faith; that is to say, that the original owner parted with title without reserving or seeking to reserve an interest in the property and the right to resume ownership at some subsequent time; whether the transfer was so close to the outbreak of hostilities as to appear to have been made in contemplation of war; or whether the transfer took place during the progress of hostilities. These private and intricate transactions, with the presumptions they inevitably raise or suggest, are dealt with in Articles 55 and 56 of the Declaration, and form Chapter 5, entitled "Transfer to a Neutral Flag." The subject matter of the chapter is, however, so closely connected with the determination of enemy character, forming Chapter 6, that the order might properly have been reversed; but the sequence established by the Conference will be observed in the present discussion.

Article 55 deals with the transfer of an enemy vessel to a neutral flag before, Article 56 with the transfer of an enemy vessel after, the outbreak of hostilities. The transfer before war is valid, unless it appear that it was made in bad faith, that is to say, to escape the consequences to which an enemy vessel would be exposed; but the fact that war followed on the heels of the transfer generates suspicion and gives rise, to quote the Declaration, to "a presumption, if the bill of sale is not on board a vessel" transferred to a neutral less than sixty days before the war, that the transfer is void—a presumption, however, which may be rebutted. It will be noted that the transfer is valid with a presumption of invalidity, in the absence of the bill of sale; that the burden of proof is upon the captor, who seeks to set it aside as tainted with fraud, and that the presumption raised by the absence of the bill of sale can be rebutted. But, as has frequently been pointed out, the neutral desires, above all things, certainty, for, if he knows the law and its consequences, he can conform his actions to them. Therefore, a second paragraph of Article 55 endeavors to meet his needs by providing that a *bona fide* transfer effected more than thirty days before war is, unless the bill of sale be not on board, to be considered valid, and that the presumption of its validity is absolute, if the transfer is, in the language of the Declaration, "unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor

the profits earned by, the vessel remain in the same hands as before the transfer."

The failure, however, to have the bill of sale on board when the transfer has occurred less than sixty days before the outbreak of hostilities, is regarded as a circumstance of such a suspicious nature as to show probable cause for capture; but, as pointed out by the report, the vessel must be released if the evidence shows the transfer to have been complete and absolute, although in this case damages cannot be claimed. In other words, if the transfer is actual and complete, and the provisions of law complied with, title passes and the transfer will be recognized as valid in judicial proceedings. The case, however, is more suspicious and the presumption of invalidity more justifiable if made during war. The purpose of the Declaration, however, is not to prevent legitimate transactions between citizens or subjects of the belligerent and the neutral, but to see to it that the transfer was not merely for the purpose of avoiding capture, to which enemy property is exposed. Therefore, the transfer is void unless it be proved that it was not made in contemplation of war. The burden of proof properly shifts to those who maintain the validity of the transaction.

There are, however, certain attendant circumstances which raise a presumption so strong that it cannot be rebutted; namely, transfer during a voyage to or in a blockaded port; reservation by the vendor of a right to recover the vessel, for in this case the transfer is colorable, not absolute or complete, as is also the case "if the requirements of municipal law covering the right to fly the flag under which the vessel is sailing have not been fulfilled."

The desire of the Conference evidently was to protect valid transfers entered into in good faith, whether before or during the war, but to unmask fraud and bad faith, whether committed in anticipation of hostilities or during their actual existence. The articles are, it is believed, unobjectionable, supposing that private property of the enemy is to remain, as is at present the case, subject to capture.[70]

[70] On the question of transfer to a neutral flag covered by Articles 55 and 56, see for English cases: *The Benedict*, Spinks, 314: *Baltica*, 11 Moore P. C., 141; *Minerva*, 6 C. Robinson, 396 (1807); *General Hamilton*, 6 C. Robinson, 62 (1805); *Jan Frederick*, 5 C. Robinson, 128 (1804); *Sechs Geschwistern*, 4 C. Robinson, 100 (1801); *Vigilantia*,

ENEMY CHARACTER

It has not escaped observation that the Declaration bristles with the term "enemy" applied to property, and it is therefore of fundamental importance that its meaning be determined if we are to talk in terms of

1 C. Robinson, 1 (1798). The English rule is, in effect, that the sale of an enemy vessel to a neutral may be made at any time or place except a blockaded port. It must, however, as against a captor be complete and *bona fide*, and if made in time of war the purchaser must have taken possession. Russia and France do not recognize transfers to neutrals unless unconditional and made before the war; Holland recognizes such transfers without restriction if not made in a blockaded port; Spain and other states follow in the main the British practice. (See Parliamentary Papers, Miscellaneous No. 5, 1909, pp. 27, 31, 52, 56.)

The American law is stated in the *Benito Estenger* (1899), 176 U. S. 568. The *Benito Estenger*, which was captured by the U. S. S. Hornet June 27, 1898, was, prior to June 9, 1898, the property of Spanish subjects. On that day a bill of sale was made to a British subject, and, on compliance with the requirements of the British law governing registration, the *Benito Estenger* was registered as a British vessel in the port of Kingston, Jamaica. Chief Justice Fuller, citing the English cases, held that transfers of vessels *flagranti bello* cannot be sustained if subjected to any condition by which the vendor retains an interest in the vessel or its profits, a control over it, or a right to its restoration at the close of the war; and that the burden of proof in respect of the validity of such transfers being on the claimant, the requirements of the law of prize were not satisfied by the proofs in this case.

See also the interesting case of *The Georgia* (1868), 74 U. S. 132.

The Georgia was a war vessel of the Confederate States which entered the port of Liverpool to escape from the vessels of the United States in pursuit. It was there purchased by a British subject, transformed into a merchant vessel under the British flag and, on its issue from the port of Liverpool, it was captured by the United States ship of war *Niagara*, September 15, 1864, off the coast of Portugal. Justice Nelson, in delivering the opinion of the court confirming the condemnation of the *Georgia* by the District Court for Massachusetts, said (p. 42):

"It has been suggested that, admitting the rule of law as above stated, the purchase should still be upheld, as the *Georgia*, in her then condition, was not a vessel of war, but had been dismantled, and all guns and munitions of war removed; that she was purchased as a merchant vessel, and fitted up, *bona fide*, for the merchant service. But the answer to the suggestion is, that if this change in the equipment in the neutral port, and in the contemplated employment in future of the vessel, could have the effect to take her out of the rule, and justify the purchase, it would always be in the power of the belligerent to evade it, and render futile the reasons on which it is founded. The rule is founded on the propriety and justice of taking away from the belligerent, not only the power of rescuing his vessel from pressure and impending peril of capture, by escaping into a neutral port, but also to take away the facility which would otherwise exist, by a collusive or even actual sale, of again rejoining the naval force of the enemy."

the known. Two principles struggle for mastery—nationality and domicile—and each has its partisans. Nothing seems fairer at first sight than that nationality should follow person and property and furnish the test of character as well as of protection. It has the advantage of apparent simplicity, but simplicity is not the only element entering into the problem. Person and property are subject to the municipal law of the home country, supposing that both person and property are within its jurisdiction, but municipal rights and privileges do not cross the frontier. The stranger within the gates cannot well ask greater rights than the native, and that his property receive a protection unknown to the property of the native in like circumstances. The foreigner should not be discriminated against either in person or property, but equality of treatment is the most that can be expected. This view is all the more rational because the alien is not forced to locate in a foreign country. He may stay at home; but, if he has chosen residence in foreign parts, he should, it is believed, be held to a performance of all the duties and should enjoy all the rights and privileges not inconsistent with foreign allegiance. A foreign resident in the United States cannot, it is believed, reasonably hope for greater rights than the American citizen, and in time of war he should not be permitted to separate himself and his fortune from the fate of the community. If we are unfortunately at war, his property is, for the purposes of war, American property, enjoying the benefit of protection as such and suffering the consequences. Enemy character would, for the purposes of the war, thus depend upon domicile, and as the principle of nationality conflicts with or may be opposed to domicile, it is evident that the acceptance of the one involves the rejection of the other principle.

The Conference was unable to adopt one or the other principle, as unanimity so essential to the Conference could not be obtained. Given the success in reconciling divergent views on the destruction of neutral prizes, and harmonizing practices which seemed at variance in theory if not in fact in matters of blockade and contraband, it would appear that the trouble was with the subject rather than with the Conference, and that compromise was excluded in the very nature of things. As the purpose of this article is rather to explain and, in a large and ungrudging measure, to justify the Declaration, it seems best to consider the articles

dealing with enemy character, which it was able to adopt, without declaring either in favor of nationality or domicile, rather than to indulge in criticism at the expense of either principle, as it is to be feared that criticism would result in little more than a personal preference and fail to produce conviction. It must be admitted, however, that the inability of the Conference to define enemy character in such a manner as to meet with the approval of the Conference and thus to supply the law for the proposed Prize Court, to be interpreted and applied by it under Article 7 of the Prize Court Convention, furnishes the opponents of both the Court and the Convention with arguments; for the law on this point not having been determined by the Conference and incorporated in its Declaration, leaves the Court without law or forces it to legislate, to prevent which the Conference was called.

The Declaration of Paris, stating in its preamble that "maritime law in time of war has long been the subject of deplorable disputes, that the uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents, which may occasion serious difficulties and even conflicts," declared that "the neutral flag covers enemy goods with the exception of contraband of war;" that "neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag." Although the Declaration of Paris has not been signed by every civilized nation, so that in theory its provisions are not universal law, it has nevertheless been followed in practice, and the two principles may be considered law without fear of contradiction. But that Declaration did not define enemy goods, so that to interpret and to apply this very important instrument, it is necessary to determine enemy character; otherwise we are speaking in terms of the unknown; and enemy character will, it is believed, be an indefinite term as long as nationality and domicile are competing doctrines. As the naval Conference was unable to declare itself squarely in favor of one or the other, and as all efforts to compromise the differences failed, it is evident that its treatment of enemy character is fragmentary, if not superficial and provisional, instead of definitive. It is perhaps well to state, before considering the articles upon which the Conference agreed, that the participation of a neutral in trade close to it in time of war—the so-called rule of 1756—was, upon the request of

the British Government, which created the doctrine, specifically excluded from the deliberations of the Conference and is unaffected by its Declaration. In view of this fact, it seems unwise to dwell at any length upon the rule, and yet it requires more than a passing notice.

In the case of the *Emanuel* (1 C. Robinson, 296), decided in 1799, Sir William Scott refused freight to a neutral ship carrying salt from one Spanish port to another during the war between Great Britain and Spain, and in the course of his judgment he said:

> As to the *coasting trade*, supposing it to be a trade not usually open to foreign vessels, can there be described a more effective accommodation that can be given to an enemy during a war than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured, to other parts where they are wanted for use? [71]

And in the leading case of the *Immanuel* (2 C. Robinson, 186), decided in the same year, the same learned judge elaborately stated the doctrine which he applied in the previous case. Briefly stated, the *Immanuel* was a neutral ship of Hamburg, which on a voyage to Santo Domingo touched at Bordeaux, selling a part of its cargo from Hamburg and taking on a quantity of iron ores and other articles for San Domingo. The question arose and was elaborately argued "whether the trade from the mother country of *France* to *St. Domingo*, a *French* colony, was not an illegal trade, and such as would render the property of neutrals engaged in it liable to be considered as the property of enemies, and subject to confiscation." In the course of his judgment Sir William Scott stated the rights of neutrals in the following passage, which is a classic of Anglo-American jurisprudence:

> Upon the breaking out of a war, it is the right of neutrals to carry on their *accustomed trade*, with an exception of the particular cases of a trade to blockaded places, or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search; in which case however they are entitled to freight and expenses. I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and endangered; in the nature of human connections it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals

[71] 1 C. Robinson, 300.

will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than fully balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But without reference to accidents of the one kind or other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title, than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking.[72]

After discussing the conditions of colonial trade and the benefits which would accrue to the belligerent by withdrawing such trade from capture by entrusting it to neutrals, he says:

Upon these grounds, it cannot be contended to be a *right* of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war, it is a measure not of *French* councils, but of *British* force.[73]

Sir William Scott in a later case (*The Wilhelmina*, 4 C. Robinson, Appendix 4), stated that his action was based upon the British instructions of 1793, but he was careful to add that,

Although the instructions of 1793, could not be said to make property so engaged liable to confiscation, if it were not so by the general law; it will not be too much to attribute to those instructions, to say, that they are to be taken as proof, that the Government of this Country understood such to be the law of nations, at the time when those instructions issued. From the conduct of *France* also, in opening the ports of her *colonies* a short time previous to the breaking out of the *American* war, for the purpose of avoiding the application of this principle, it is manifest

[72] 2 C. Robinson, 197–8.

[73] *Ibid.*, 200. See on this question the case of the *Wilhelmina*, 4 C. Robinson, Appendix, pp. 4–15, in which Sir William Scott examines the criticisms, reconsiders, and reaffirms the doctrine.

that the principle itself was thoroughly understood, by that Government, to be agreeable to the law of nations.[74]

Sir William Scott evidently agreed with his great contemporary, Chief Justice Marshall, that "as no nation can prescribe a rule for others, none can make a law of nations;" [75] and he also agreed with him that each nation may and must interpret international law. But whether the principle alleged to be international law is really so or whether the interpretation is correct is of course a different matter. But however this may be, the principle itself and its application form no part of and are not affected by the Declaration, and in so far as the rule of 1756 is concerned, the Declaration is fragmentary or defective.

Passing now to the articles of the Declaration on enemy character. Article 57 states in clear and acceptable terms that "the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly," and properly makes the transfer of an enemy vessel to a neutral flag dependent upon the provisions of Articles 55 and 56. The difficulty arises when the character of the goods found upon an enemy vessel is broached. The Conference contented itself with the statement that "the neutral or enemy character of goods * * * is determined by the neutral or enemy character of the owner" (Article 58); but as there is no definition of the character of "the owner," it is evident that enemy character is expressed in terms of the unknown, a fact due to the inability of the Conference to agree upon nationality or domicile as a test. The Conference had no illusion on this point, and Professor Renault in his report, adopted by the Conference as its official interpretation of the Declaration, says:

> But it cannot be concealed that Article 58 solves no more than a part of the problem, and that the easier part; it is the neutral or enemy character of the owner which determines the character of goods, but what is to determine the neutral or enemy character of the owner? On this point nothing is said, because it was found impossible to arrive at an agreement. Opinions were divided between domicile and nationality.[76]

[74] 4 C. Robinson, Appendix, p. 11.

[75] The Antelope, 10 Wheaton, 122 (1825).

[76] Treaties, Conventions, etc., Vol. 3 (Charles), p. 315. The following compromise was proposed but not accepted:

> The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy nationality of their owner, or, if he is of no nationality

The Conference, however, stated the traditional rule, subject to rebuttal, that goods "found on board an enemy vessel * * * are presumed to be enemy goods;" in the absence of proof to the contrary. The conflict between nationality and domicile is again apparent.

Article 60 applies to enemy goods—whatever this phrase may mean—on board an enemy vessel the provisions of Article 55 regarding the invalidity of transfer during war, by providing that they "retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded." It was recognized however, that, to quote the language of the report,

> In a great number of countries an unpaid vendor has, in the event of bankruptcy of the buyer, a recognized legal right to recover the goods which have already become the property of the buyer but [which have] not yet reached him (stoppage *in transitu*.) [77]

This is a formal recognition of the doctrine of stoppage *in transitu*. It is admitted that in times of peace title may pass to the consignee upon delivery to the master or that it may be retained by the vendor until actual delivery. This is a matter of convenience, and for the determination of the parties to the transaction. Nations as such are not involved. If, however, the neutral vendor were allowed in time of war to retain title until actual delivery to the consignee of the goods in question, the neutral character would be preserved during the voyage and the goods thus would be exempt from capture. Hence the reason for the rule that delivery to the master is delivery to the consignee. But, if the enemy purchaser had not paid the price, the capture would not affect him, but would saddle the neutral with the loss. Hence the Conference adopted the doctrine of stoppage *in transitu*, which allows in case of bankruptcy of the enemy consignee "a recognized legal right to recover the goods," by the exercise of which they regain the neutral character which they had lost in theory but not in fact.

or of double nationality (*i. e.*, both neutral and enemy), by his domicile in a neutral or enemy country;

Provided that goods belonging to a limited liability or joint stock company are considered as neutral or enemy according as the company has its headquarters in a neutral or enemy country. (*Ibid.*)

[77] Treaties, Conventions, etc., Vol. 3 (Charles), page 316.

In discussing this question, Sir William Scott said in the case of the *Vrow Margaretha* (1 C. Robinson, 336), decided in 1799, and which concerned a transfer *in transitu* to a neutral before the outbreak of hostilities:

> In the ordinary course of things in time of peace—(for it is not denied that such a contract may be made, and effectually made according to the usage of merchants) such a transfer *in transitu* might certainly be made. It has even been contended that a mere delivering of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, that it transfers only the right of delivery; but that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot well be doubted. When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in an enemy's country, would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu;* and in that sense I recognize it as the rule of this Court. But this arises, as I have said, out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace. The transfer, therefore, must be considered as not invalid in point of law, at the time of the contract; and being made before the war, it must be judged according to the ordinary rules of commerce.[78]

To the same effect is the law laid down by an illustrious American judge, Mr. Justice Story, who said in the case of the ship *Ann Green* (1 Gallison, 274, 291), decided in 1812:

> The cases are, as I think, settled upon just principles, that decide that in time of war, property shall not be permitted to change character in its transit; nor shall property consigned, to become the property of the enemy on arrival, be protected by the neutrality of the shipper. Such contracts, however valid in time of peace, are considered, if made in war or in contemplation of war, as infringements of belligerent rights, and calculated to introduce the grossest frauds. In fact, if they could prevail, not a single bale of enemy's goods would ever be found upon the ocean.

[78] 1 C. Robinson, 338–9.

The chapter dealing with enemy character is, for the reasons which have been stated, fragmentary in character; but it is clearly no objection to the acceptance of the chapter that it does not cover the entire field, if, so far as it goes, its actual provisions are reasonable and satisfactory, for the law unchanged by the Declaration remains as it was.

CONVOY

Regarding the chapter on convoy, little need be said except that many nations regarded neutral vessels under the convoy of vessels of war as exempt from search, on the theory that the word of the commander as to their neutral character and as to their cargo was, as the act of a responsible officer, an act of state, whereas some nations refused to accept the word of the officer as a bar to visit the vessels and to examine their cargoes, in order to determine their neutral character. There can clearly be no objection to accepting the word of the commander of the neutral man-of-war, provided that he act in good faith, and, as his statement is to be taken as an act of state for which his government is responsible, the belligerent has his remedy against the neutral government and is saved the delay and annoyance involved in ascertaining the facts for himself. But the aim of the belligerent is to prevent unneutral trade, and a claim for damages against the neutral nation is not synonymous with prevention.

The views of the United States, differing, as will be seen, from those of Great Britain, are thus briefly stated in Article 30 of the Naval War Code of 1900:

> The exercise of the right of search during war shall be confined to properly commissioned and authorized vessels of war. Convoys of neutral merchant vessels, under escort of vessels of war of their own state, are exempt from the right of search, upon proper assurances, based on thorough examination, from the commander of the convoy.

The English law is contained in the leading case of *The Maria*, decided by Lord Stowell in 1799, who said:

> This being the *actual* state of the fact, it is proper for me to examine, 2dly, what is their legal state. Or, in other words, to what considerations they are justly subject according to the law of nations; for which

purpose I state a few principles of that system of law which I take to be incontrovertible.

1st, That the right of visiting and searching merchant-ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destination what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that *free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many *European* treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of *Hubner* himself, the great champion of neutral privileges. * * *

2dly, That the authority of the Sovereign of the neutral country being interposed in any manner of mere force cannot *legally* vary the rights of a lawfully-commissioned belligerent cruiser; I say *legally*, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this Court, I have no right to entertain. All that I assert is, that *legally* it cannot be maintained, that if a *Swedish* commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the King of *England*, being neutral to *Sweden*, is authorized by that law to obstruct the exercise of that right with respect to the merchant-ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit, as in some late instances they have agreed, by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply, that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force.[79]

[79] 1 C. Robinson, 340, 360–362. See also *The Elsabe* (1803), 4 C. Robinson, 408.

Agreement was facilitated by the instructions to the British delegates on the matter in hand. They said:

> The question of the right to visit, search, and seize neutral ships when under convoy is one on which there has been a clear divergence between the old Continental system and the British doctrine. That doctrine has however not been enforced in any recent war. In 1854 the right to visit ships under convoy was specifically waived, owing to the difficulty inherent in naval co-operation with an allied Power which did not recognize that right. Nor have His Majesty's Government since attempted to exercise it. The situation was radically changed by the Declaration of Paris, which put an end to the right formerly enjoyed, of seizing enemy goods other than contraband, under whatever flag carried, and His Majesty's Government are now desirous of limiting as much as possible the right to seize for contraband, if not eliminating it altogether.[80]

There were then two sides to the question, but it is believed that the word of the commander of the neutral vessel may properly be accepted, if the rights of the belligerent are safeguarded by apt provisions. This seems to have been accomplished by the Declaration, the provisions of which on this point are quoted without comment:

ARTICLE 61

> Neutral vessels under national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent warship, all information as to the character of the vessels and their cargoes which could be obtained by search.

ARTICLE 62

> If the commander of the belligerent warship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the warship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.

RESISTANCE TO SEARCH

In the same way there seems to be no serious objection to Chapter 7 dealing with the resistance to search, although this question was not

[80] Parliamentary Papers, Miscellaneous No. 4, 1909, p. 25.

included in the call of the Conference. It is so closely connected with the subject matter of the Declaration and the right itself is so clearly recognized and admitted, that the Conference was clearly within its rights, and indeed it is to be commended for its formulation and express statement. The article is as follows.

ARTICLE 63

Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.

There seems to be less reason for commenting upon this article than on the one relating to convoy, and yet, for purposes of clearness, a paragraph is quoted from the official report, in order to clear up certain doubts that might present themselves.

What must be decided with regard to the cargo? The rule which appeared to be the best is that according to which the cargo will be treated like the cargo on board an enemy vessel. This assimilation involved the following consequences. A neutral vessel, which has offered resistance becomes an enemy vessel and the goods on board are presumed to be enemy goods. Neutrals who are interested may claim their property, in accordance with Article 3 of the declaration of Paris, but enemy goods will be condemned, since the rule that the flag covers the goods can not be adduced, because the captured vessel on board which they are found is considered to be an enemy vessel. It will be noticed that the right to claim the goods is open to all neutrals, even to those whose nationality is that of the captured vessel; it would seem to be an excess of severity to make such persons suffer for the action of the master. There is, however, an exception as regards the goods which belong to the owner of the vessel; it seems natural that he should bear the consequences of the acts of his agent. His property on board the vessel is therefore treated as enemy goods. A fortiori the same rule applies to the goods belonging to the master.[81]

COMPENSATION

The final chapter of the Declaration, in so far as its subject matter is concerned, deals with compensation to be allowed to claimants whose just rights have been disregarded, a question so important that the

[81] Treaties, Conventions, etc., Vol. 3 (Charles), p. 319.

Declaration would have been faulty without it; for, if its provisions are to be enforced, there should be a sanction, that is to say a penalty, attached to their violation. Article 64 is thus worded:

> If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods.

Notwithstanding the importance of this provision, it will not be discussed in detail, for it is remedial rather than substantive in its nature, to use a term dear to the analytical jurist. It should be said, however, that its terms presuppose that the question involved in the capture of the vessel or goods is tested in a judicial proceeding. If the action of the belligerent is upheld by the national court, the neutral nevertheless, thanks to the Second Hague Conference, is to have another and an additional remedy, because the proposed International Prize Court is, by Article 3 of the convention, competent to pass not only upon judgments of national courts affecting neutral property, but also upon judgments involving enemy property in certain specified cases. Thus:

> The judgments of national prize courts may be brought before the International Prize Court:
>
> 1. When the judgment of the national prize courts affects the property of a neutral Power or individual;
> 2. When the judgment affects enemy property and relates to—
>
> (a) Cargo on board a neutral ship;
>
> (b) An enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim;
>
> (c) A claim based upon the allegation that the seizure has been effected in violation, either of the provisions of a convention in force between the belligerent Powers, or of an enactment issued by the belligerent captor.
>
> The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law.[82]

The liability of the belligerent to make good its wrong acts was stated in the penal section attached to the laws of war on land drafted by the Institute of International Law in 1880, and known as the Oxford Manual of War on Land:

[82] Treaties, Conventions, etc., Vol. 3 (Charles), p. 250.

If any of the foregoing rules be violated, the offending parties should be punished after a judicial proceeding by the belligerent in whose hand they are.

This provision, reasonable in itself and representing the consensus of opinion of enlightened publicists, was carried over and incorporated in the Convention Respecting the Laws and Customs of War on Land, as revised by the Second Hague Conference, in which it appears in the following language as Article 3 thereof:

A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

The principle, therefore is admitted; the proposed Prize Court provides the machinery.

The convention establishing the Prize Court allows a national decision and one national appeal, but provides in any case that the appeal will lie to the International Court within two years from the date of capture, even although the national courts have not given final judgment in the case (Article 6). But this is not all; the appeal may not only be made by a neutral Power, in accordance with Article 3 of the convention, but by a neutral individual, subject, however, to the right of his government to forbid the appeal; or, finally, by an individual, subject or citizen of an enemy Power, in accordance with the provisions of Article 3, section 2, omitting therefrom the case mentioned in paragraph (b) thereof. It appears, therefore, that not merely is there to be a judicial determination of the legality or illegality of the capture of vessels or of goods, but also that the question involved in the capture is to be passed upon, not, as formerly, by courts of the captor's country, with every presumption in favor of its validity, but by an international court, without belligerent bias, as it is to be composed of an overwhelming majority of neutrals.

The captor cannot escape by the mere fact that the national court has failed to act or that a final judgment has not been rendered, and by Article 64 of the Declaration a release of the prize "without any judgment being given" does not end matters. The validity or invalidity of the belligerent act must be passed upon, whether there is or is not a

judicial proceeding in the captor's country, and whether or not there has or has not been a final judgment. The avenues of escape are closed.

But the law is properly tempered with mercy. Human frailty is recognized in that probable cause for capture precludes damages. The question of compensation is apparently left to national determination, with redress through diplomatic channels.

FINAL PROVISIONS

The balance of the Declaration will be treated briefly, as its final provisions are, generally speaking, of a formal character. Article 65 states that the provisions of the present Declaration must be treated as a whole, and cannot be separated. Professor Renault rightly considers this article, borrowed from the Declaration of Paris, as of great importance. But the precedent is less important than the reason; for, if the nations participating in the Conference could accept it piecemeal and ratify some of its provisions to the exclusion of others, the purpose of the Conference would have been frustrated, which was to supply the law to be administered by the proposed Prize Court under Article 7 of the convention to establish the international prize court and, by supplying the law universally acknowledged as such, to reconcile divergences of practice, and to obtain an official and authoritative interpretation and application of it to the concrete case. It would have been manifestly unfair to allow a nation, satisfied with some of its provisions, to accept the benefits secured, perhaps by concession, and to reject the concession which made the Declaration in other parts acceptable to the participating Powers. It is of course proper to consider whether the price paid is, on the whole, too great, and to reject the Declaration *in toto;* but even here it would be better to attempt to reach an agreement for the exclusion of the obnoxious article or by negotiation to obtain its modification. It hardly needs to be stated that only the Powers taking part in the Conference and which have ratified the Declaration as a whole are bound by its provisions, and, as far as they are concerned, Article 66 requires neither explanation nor comment.

ARTICLE 66

The signatory Powers undertake to insure the mutual observance of the rules contained in the present declaration in any war in which all

the belligerents are parties thereto. They will therefore issue the necessary instructions to their authorities and to their armed forces, and will take such measures as may be required in order to insure that it will be applied by their courts, and more particularly by their prize courts.

The same may be said of Article 67 providing that the Declaration shall be ratified as soon as possible and that the ratifications thereof shall be deposited in London. This is of a purely formal character and has been taken with but slight and necessary modifications from the formula adopted by the Second Hague Conference. The same may be said of Articles 68 and 69, referring to the date at which the Declaration shall become effective and the right to denounce—that is, abrogate—the Declaration, in so far as any particular party thereto is concerned.

But Article 70 is not of a purely formal nature and requires consideration. It goes without saying that the Powers represented at the London Naval Conference attach particular importance to the general recognition of the rules which they have adopted; otherwise they would either condemn in advance the results of their labors, which was not to be expected, or regard their situation as so exceptional in the society of nations as to justify preferential treatment. It is unfortunately the case that the latter supposition is not without basis, for a declaration intended to adopt the law to be generally applied not merely by themselves but by the proposed Court was drafted by but a fraction of the Powers, albeit a very important fraction, without any request on the part of the nations generally and without any mandate from them to legislate for the world at large. Larger Powers may prefer to exclude the smaller nations on the principle that birds of a feather flock together, but they should neither feel astonishment nor express regret that the Powers excluded from the Conference—and Great Britain in the first instance committed the blunder, of excluding Holland, in which country the proposed Court was to be established and the law drafted by the Conference to be applied—should look upon their action as high-handed and arbitrary, if not presumptuous. It is no doubt true, as stated by the learned reporter, that the Declaration of Paris was drafted by the representatives of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, assembled in congress in Paris in 1856, and that the plen-

ipotentiaries engaged "to bring the present Declaration to the knowledge of the states which have not been called upon to take part in the congress of Paris and invite them to accede to it," in the conviction that it would be received with gratitude by the whole world, and that they expressed the hope that "the efforts of their governments to obtain the general adoption thereof will be crowned with full success." It was eminently reasonable that the Powers engaged in the Crimean War should meet in conference to decide upon the terms of peace, and that in the course of their negotiations they might, without summoning other representatives, draft a declaration on points of maritime law, which had either arisen in the course of the war or which were of particular importance to them to have settled.

But the world has moved since 1856, and the Naval Conference of 1908–9 was not composed of belligerents ending a war. The convention which their labors would, it was hoped, tend to render effective was itself negotiated at an international conference composed of representatives of nations recognizing and applying international law in their foreign intercourse. It is difficult to overcome the belief that all parties to the original Prize Court Convention were entitled to be heard upon the rules of law which were to be adopted and applied by the Court, and it is believed also that the nations not invited will be slow to adhere to a Declaration which must be accepted *in toto*, prepared by a Conference from which they were excluded. If it were true in 1825, as stated by Chief Justice Marshall, that no nation can prescribe a rule for others and that no one nation can make a law of nations, it was doubly true in 1908–9, and it requires no argument to show that a group of nations cannot do collectively what no one nation can do singly. The present writer believes that the excluded nations are justified in not accepting the invitation of the participants in the Naval Conference to adhere to the Declaration, nay more, that they would stultify themselves, if they did so adhere. The day has fortunately passed when a number of nations can, as it were, get into a corner and in undertones decide the law which others than themselves are to obey. The regulation of international law is an international matter and is of concern to all nations, whether they be large or small, and machinery (the Hague Conference) fortunately exists which allows nations peaceably to assemble and not merely to

petition, but to redress their grievances. Without underestimating the value of the Declaration and the advantages which a small conference may have over a large one, it is better to recognize the change that has come over the world and, if small conferences of an international nature are held, to consider their conventions or declarations, if they are to bind all, as proposals to be submitted to a future Hague Conference for discussion, amendment and universal acceptance. Otherwise the Hague Conference is stripped of its power, and its partisans are expected to admit their incapacity to develop a system of international law fitted to the needs of the nations as a whole and binding upon all, because drafted and accepted in conference.

There is another reason which of itself would suggest that matters of this nature be submitted to the Hague Conference, instead of to smaller bodies, even although they should be made up of experts and therefore appear to be more competent and the conventions adopted by them more technical, more applicable, in a word, more perfect. The Hague Conference has a prestige which no other assemblage possesses, and what has the stamp of its approval carries with it an authority which cannot be gainsaid. It has every presumption in its favor, and ratified or unratified, it reaches the conscience and controls the conduct of nations. The Hague Conference has not only prestige, but it has an educational influence quite apart from the value of its work. It appeals to the imagination of nations as well as of men. Preparation for it is a privilege as well as a duty. Delegates are influenced by delegates, and they return to their respective homes changed, if not better, men. They are, as it were, a center from which internationalism spreads, like the little leaven that leavens the lump, until little by little the whole mass is permeated with the newer spirit. We cannot afford to forego these advantages. We must sustain the Conferences; we must supply them with work; we dare not lessen their prestige by withdrawing from them the consideration of important questions; and we must enhance, not neutralize, their educational influence by creating rivals, which, although they cannot do their work, may go far to undo it. The Hague Conference may work more slowly than the smaller one, and difficulties and delays may mark the one which are foreign to the other. We must, however, not forget the beautiful remark of the enlightened initiator of the Con-

ferences, the Czar Nicholas, as quoted by Ambassador Jusserand in an address before the American Society for Judicial Settlement of International Disputes in 1910: "One must wait longer when planting an oak than when planting a flower."

It is fortunate, however, that the effect of an international convention does not depend exclusively upon its ratification. From the legal standpoint, a convention which has not been ratified may be considered as non-existent, or at most as a project. From the moral standpoint, it is regarded as a consensus of enlightened opinion and, although its provisions are not binding upon the nations, they are strongly inclined to give effect to them. Thus, in the recent war between Italy and Turkey, both belligerents, one a signatory to the Declaration which it had not ratified, the other neither a signatory nor an adherent, nevertheless conducted their operations in accordance with its terms. Thus, an Italian royal decree, dated October 13, 1911, prescribed the observance of the Declaration of London, in so far as Italian laws permitted, although the Declaration had not been ratified. In like manner Russia insisted upon the observance of the Declaration of London, stating that

> The Imperial Government, basing itself on the Declaration of Paris of 1856 and on Articles 24 and 33 of the Declaration of London, considers that cargoes of corn are subject neither to arrest nor to confiscation when addressed from Russian ports on the Black Sea to Italian or other ports so long as such cargoes are not destined for Italian field forces or for Italian official consignees. Any attempt to arrest or confiscate the above-mentioned cargoes the Russian Government will regard as a violation of the rights of Russia, and the Government gives warning of the heavy responsibility which the Turkish Government would incur in such circumstances.

The warning did not fall upon deaf ears, for on October 13, 1911, the Turkish Government issued a report of the Council of Ministers to the effect that, although Turkey had not adhered to the Declaration of London, it nevertheless intended to comply with its provisions. Upon this state of affairs Sir Thomas Barclay thus comments:

> It is interesting to note that one of the consequences of the war has been the adoption by Russia and Turkey of the rules of the Declaration of London relating to contraband, although it has not yet been ratified by either Power, and that the first country to benefit by its clauses

is Great Britain and this in connection, with the food supply of these islands.[83]

CONCLUSION

In speaking of the Declaration of London, Professor Renault says in his report, and in language which was not only approved by the Conference, but which doubtless expressed the views of its members as to the nature and value of their work:

> The solutions have been extracted from the various views or practices which prevail and represent what may be called the *media sententia*. They are not always in absolute agreement with the views peculiar to each country, but they shock the essential ideas of none. They must not be examined separately, but as a whole; otherwise there is a risk of the most serious misunderstandings. In fact, if one or more isolated rules are examined either from the belligerent or the neutral point of view, the reader may find that the interests with which he is especially concerned are jeopardized by the adoption of these rules. But they have another side. The work is one of compromise and mutual concessions. Is it, as a whole, a good one? [84]

After expressing the hope that a serious study of the Declaration will result in an affirmative answer to his question, the reporter proceeds to state some of the reasons which justify his expectation:

> The declaration puts uniformity and certainty in the place of the diversity and obscurity from which international relations have too long suffered. The Conference has tried to reconcile in an equitable and practical way the rights of belligerents with those of neutral commerce; it consists of Powers whose conditions, from the political, economic, and geographical points of view, vary considerably. There is therefore reason to suppose that the rules on which these Powers have agreed take sufficient account of the different interests involved, and hence may be accepted without objection by all others.[85]

The commendation of eminent publicists could be quoted in favor of the Declaration and criticisms, particularly of English publicists, might be cited against it; but the Declaration must stand by itself and as a whole, irrespective of the praise of its partisans or of the censure of its

[83] Barclay, Turco-Italian War and Its Problems (1912), p. 100.
[84] Treaties, Conventions, etc., Vol. 3 (Charles), p. 284.
[85] *Ibid.*, page 284.

opponents. The question put by the learned reporter—Is it, as a whole, good?—must be answered, and it is only from the Declaration and its provisions, considered as a whole, that the answer can come. It was proposed at one time by the British Government that "two instruments should be negotiated, one a declaration of existing law, the other a convention, ancillary thereto, and supplementing its provisions by additional rules, accepted as operative between the parties." A single document was preferred, and it was found possible by compromise and mutual concessions to choose what the reporter calls the *media sententia*, and the partisans agreed, as stated in the preliminary provision of the report, that "the rules contained in the following chapters correspond in substance to the generally recognized principles of international law;" that is to say, notwithstanding compromise and concession, the Declaration is a codification of generally recognized principles, not necessarily principles recognized by all nations so as to be properly considered universal, but recognized by so many nations as to justify the statement that they are generally recognized. That the Declaration does so correspond in substance, if not in form, to the generally recognized principles of international law must be taken as the view of the Conference, because the reporter specifically says that "this provision dominates all the rules which follow," and, in pursuance of this general belief, the purpose of the Conference, to quote the language of the report, "has above all been to note, to define, and, where needful, to complete what might be considered as customary law;" or, as stated in the preamble, its purpose was "to arrive at an agreement as to what are the generally recognized rules of international law within the meaning of Article 7 of the Convention of the 18th October, 1907, relative to the establishment of an International Prize Court." This statement of the learned reporter and of the preamble has been criticized and the Declaration pronounced "a heterogeneous assemblage of old and new rules." [86] But a careful examination of the Declaration as a whole and of each of its provisions in the light of international law and of the practice of the states represented at the Conference, not merely of Anglo-American doctrine and practice, justifies, in the opinion of the writer, the state-

[86] Professor Holland's "Proposed Changes in Naval Prize Law," an address read before the British Academy, May 31, 1911, p. 8 in the separate reprint.

ment of the learned reporter that the Declaration actually does, as the preliminary provision of the Declaration itself states, "correspond *in substance* with the generally recognized principles of international law," and that it is based upon fundamental conceptions of what may be considered customary law.

It should be borne in mind that the reporter said *in substance;* he did not say *in theory* or *in form.* A careful examination of blockade as practised, not as theoretically expounded, convinced the Conference that Continental practice and what may be called Anglo-American practice did not differ so radically as it was generally supposed, as appears from the explanation of the area of operations within which the blockade could be made effective, presented by the French delegation as the practice of the French Government as distinct from theory. In the same way an examination of the adjudged cases of British prize courts showed that whatever might be the theory, the fact was that the neutral vessel carrying contraband was invariably captured within easy range of the enemy's territory. The concession in the light of adjudged cases seems therefore to be rather a surrender of a cherished theory and of a legal right, if right it be, to do what in practice was not done.

Again, for these examples, although not taken at random, are nevertheless not designed to illustrate special provisions of the Declaration much less to apply to the formal expression of generally recognized principles, it is evident that a right to sink neutral prizes under special circumstances was claimed in theory and sometimes put into practice, with, however, a full recognition of the exceptional nature of the right claimed and of the responsibilities which its commission entailed. And, finally, the opposition in certain quarters to convoy cannot be considered as inconsistent with the contention that the right of convoy was generally recognized. If no one nation can make a law of nations, it would fortunately seem to follow in theory and in fact today that no one nation can unmake international law. It would appear, therefore, that the Conference was justified in stating that the Declaration corresponds in substance with what may be considered as customary law, if that term is to be regarded as synonymous with the practice of nations or to bear a close and direct relation to it.

Admitting that the Declaration is good so far as it goes, although

its opponents do not make this admission, an objection to its acceptance is found in the fact that it is fragmentary and incomplete, in the sense that it covers but a small portion of the field of maritime warfare, and that certain important subjects have not been included in it; that is to say, there are sins of omission which should prevent its acceptance, as well as sins of commission. These sins of omission are stated by Professor Holland to be threefold: "It is beyond controversy," he says, "that on three points the Declaration will afford no guidance to a Court which, from its composition, would, if unguided, be almost certain to decide them adversely to British views;" namely the failure to recognize the rule of the war of 1756; the absence of a "criterion of the belligerent or the neutral character of owners of cargoes;" and the omission of a specific provision as to the transformation of merchantmen into vessels of war and the place where such transformation, if permitted, can take place. It is to be observed, in the first place, that the goodness or badness of the Declaration is made to depend upon the acceptance or rejection of British views and, while it is admitted that the acceptance of a convention may be made to depend upon the acceptance or rejection of national views, as far as any one country is concerned, it is necessary so far as the society of nations is concerned, to approach the convention with what Dr. Nicholas Murray Butler has aptly termed "the international mind." In the second place, it would seem difficult to understand why a convention should be rejected, because certain subjects are omitted from it, as we are asked to ratify not what it omits but what it contains. The absence of provisions of an important kind militates against the completeness of the instrument and may justly lead to the negotiation of a supplementary convention dealing with them.

Now, as to the omissions. The rule of 1756 was omitted at the express request of the British delegation, which means that the rule stands upon its merits, irrespective of the Declaration, and that the ratification or rejection of the Declaration neither affects in theory, in law, or in fact the rule. And the same may be said of enemy character and of the transformation of merchantmen. It is well known that the Second Hague Conference, as well as the London Naval Conference, was unable to reach an agreement upon these questions, a fact stated by Professor Renault in his official report. If it be objected that the proposed Court

would decide against Anglo-American contentions on these points, for Great Britain and the United States are at one upon them, it is difficult to see wherein the newer situation would differ from the older, because the nations are opposed to these views, and an attempt on the part of either Great Britain or the United States to enforce them in practice would be opposed through diplomatic channels and might in the future, as in the past, lead to combinations such as the armed neutrality of 1780 and 1800. Sooner or later we of the English-speaking world must learn that the whole is greater than any of its parts.

The chapter on contraband is, as has been said, the head and front of British opposition to the Declaration, more especially Article 34 thereof. Little or no objection is made to the list of absolute contraband (Article 22) and the right reserved in Article 24 to add to this list is a right which nations have exercised in the past, subject to diplomatic protest. The right remains, but in addition thereto there is, under the Declaration, a guarantee of no slight value, for Article 27 declares that "articles which are not susceptible of use in war may not be declared contraband of war," which of course can only mean that the propriety of the action shall be decided by the proposed Court in a judicial proceeding. But this is not all; a free list of objects that cannot possibly be declared contraband of war is drawn up in Article 28, and, as the Declaration is to be accepted as a whole, this list can properly be looked upon as definitely acquired. Leaving out of consideration the element of certainty which neutral merchants thus acquire in trade which is and should be neutral, it is necessary to state in this connection that calculations made by the leading delegations before and during the Conference show by facts and figures that the immunity of these different articles from capture is in itself an economic gain and calculated to tip the balance of convenience in favor of the Declaration.

It has been stated that the Declaration must rise or fall by itself, and that statements of publicists, however eminent, should not influence us to accept or to reject it, and yet such statements are not without their value. Of the opponents of the Declaration, Professor Holland is easily first in rank and influence and, as his views have deservedly more weight in the international forum than the pronouncements of politicians, it is believed that they should be quoted in preference to parliamentary

denunciations. But before quoting his views, it should be borne in mind that the British delegation to the Second Hague Conference, acting under instructions from the home government, introduced Article 7 of the Prize Court Convention, which has since been found objectionable; that the Naval Conference was called by Great Britain to reach an agreement upon principles of international law to be administered by the Court; and that the British delegation to this Conference, likewise acting under instructions, approved the Declaration. It would seem that a failure to ratify the Declaration under such circumstances may lead foreign governments to question the good faith of Great Britain, or at least the advisability of entering into negotiations with her. Professor Holland does not share these views, which are, however, generally regarded as conclusive. Thus, he says:

> The objection that, should we eventually decline to ratify the instruments [the Prize Court Convention and the Declaration of London] we should discourage future attempts at international legislation, or even "incur a serious loss of prestige," is to me unintelligible. By inviting a group of nations to endeavour to come to an agreement on certain questions, and even by allowing its own Delegates to sign an agreement so arrived at, as embodying the best bargain which they were able to obtain, our Government incurs no obligation whatever to advise the Sovereign to accept the agreement as binding upon the country.[87]

No nation liveth to itself alone.

After stating various objections to the Declaration, Professor Holland thus expresses his matured judgment:

> That the Declaration, which must, by Art. 65, be accepted as a whole or not at all, apart from any question as to its sufficiency for the needs of an International Court is, from obscurities of expression as well as from defects of substance, unfit for ratification even as an instalment of a revised system of Prize law.[88]

The late Professor Westlake, no less mindful, it is believed, of the rights and duties of his country, but more inclined to view them from the international standpoint, declared roundly in favor of the Declara-

[87] Holland, Proposed Changes in Naval Prize Law, p. 16.
[88] *Ibid.*, p. 16.

tion and of its ratification. Thus, in an article in the *Nineteenth Century* he felt justified in saying:

> That the ten greatest naval Powers of the world should have met in conference on the laws of naval war as affecting neutrals, and that after careful consideration they should have agreed upon a code so comprehensive as that contained in the Declaration of London, would alone suffice to make the year nineteen hundred and nine memorable to all who are interested in the improvement of international relations. It remains for the year nineteen hundred and ten to make that code binding on the parties by ratification, after which the natural course of events will speedily make it the binding code of the world.[89]

The hope of ratification expressed by the learned writer has not yet been realized, but whether ratified or not, the importance of the document was not overstated in another passage from the same article, which deserves not merely quotation, but careful consideration at the hands of opponents:

> The conclusion [he says] so arrived at, regarded both in itself, and in view of the difficulties surmounted, may, when ratified, be not unfairly regarded as the greatest step yet made in the systematic improvement of international relations.[90]

Such are the views expressed by writers of what may be considered the older school. The following quotation is from a writer of the newer school, who, not unmindful of the past, examines the Declaration in the light of present conditions and with a keen eye to the future. Mr. Norman Bentwich, to whom reference is made, thus sums up the controversy, and in his conclusions the present writer respectfully concurs:

> Great Britain should now be in a position to ratify the Hague Prize Court Convention, when at least she has made the necessary changes in her national prize law. She has come out very well indeed from the international bargaining; she had most to lose by the previous uncertainty; she has gained most by the settlement. At Paris, in 1856, she gave up one of her most powerful belligerent rights—the right to capture enemy property in neutral ships. Now in London she has not given up a single established belligerent right of value, her sole concession being on the question of convoy which is more apparent than real; and,

[89] The Nineteenth Century, March 1910, p. 505.
[90] *Ibid.*, p. 506.

on the other hand, she has gained a number of safeguards for her neutral commerce, and a number of limitations of the alleged belligerent rights of other Powers. There is indeed a naval school which is bitterly hostile to the ratification of the Declaration, on the ground that by it England gives up certain national claims of long standing and concedes certain rights against which she has long struggled. But the claims we give up have not been effectively exercised by us, the rights we concede have regularly been practised against us.[91]

Perhaps the view of a person foreign to the controversy but versed in international affairs of the greatest pith and moment may be quoted, especially as he considers the Declaration, not merely by its provisions, which he considers both wise and just, but as a part of the large movement which is taking visible form and shape under our very eyes. In an address on the Declaration of London before the American Society of International Law, Mr. Root said:

This review of the origin and nature of the Declaration of London and of the attendant conditions exhibits the true significance of the Declaration. It is not merely a code of useful rules. It is necessary to the existence of the International Prize Court and therefore to the existence of any Judicial Arbitral Court. It is the one indispensable forward step without which no practical progress can now be made in the further development of a system of peaceable settlement of international disputes. It is to be hoped that a fuller realization of its far-reaching importance will soon lead to its acceptance. I cannot avoid the conviction that a broad-minded and statesmanlike treatment of this constructive measure for practical progress in international relations, is of greater value than merely benevolent but academic declarations in favor of peace which are to be found in general treaties of arbitration and in diplomatic correspondence and in public speeches.

Indeed, the whole practice of making general treaties of arbitration cannot fail to be discredited by the failure, if there is to be a failure, of the Prize Court Convention, for the cynical are sure to question the sincerity of general treaties of arbitration covering the whole field of international relations between nations which refuse to assent to this convention covering but a small part of the same field.[92]

The subjects codified by the Declaration have bothered and perplexed foreign offices and text writers ever since international law has been a

[91] Quoted from address of Hon. Elihu Root, Proceedings of the American Society of International Law (1912), pp. 11–12.

[92] Proceedings of the American Society of International Law (1912), pp. 14–15.

science. Differences of time and place, as well as the means of warfare, have resulted in a divergence of views and a difference of practice which seemed impossible of reconciliation or of compromise. National prejudice and bias and a supposed benefit resulting from the maintenance of a particular doctrine and its recognition by international law, have converted philosophic observers and writers of authority into advocates rather than scientific expounders of a reasonable and therefore acceptable system of international law; the uncertainty of the law and the lack of uniformity in its interpretation and application have confused a subject sufficiently complicated in itself, and have paralyzed industry and commerce, if they have not wholly crushed them. It may well be that the Anglo-American system of jurisprudence is more precise and logical in theory and more efficient in practice than Continental theory and practice, and that the interests of the belligerent would be better served by its universal acceptance. But the neutral desires certainty and uniformity rather than logical precision, and a uniform practice is to him a first necessity, for, as pointed out by Lord Mansfield, it is more important that a rule of law be established and known than that it be correct, for industry and commerce will accommodate themselves to the rule of law if known, and the embarrassments, risks and delays incident to a state of confusion will be obviated.

The recent Naval Conference composed of specialists did not meet for an academic purpose. It was not their avowed object, although it has been the result of their labors, to produce at once a reasonable and a scientific code. Their purpose was eminently practical; namely, to reach an agreement upon certain fundamental doctrines of international law, so that the International Court of Prize established by the Second Hague Peace Conference should have for its guidance and interpretation a code of law truly international because accepted by the community of nations; for the nations were unwilling to entrust to the jurists composing the Court the codification of principles of law which they themselves had been unable to codify, and to permit the judges to harmonize divergences of practice which had baffled statesmen, diplomats, publicists, and judges for centuries. They were unwilling to take a "leap in the dark," to use a familiar expression, although willing to proceed from the known to the unknown.

Leaving out the differences of doctrine and the divergences of practice, the Conference was confronted by a difficulty which has always existed and which must exist as long as war is a recognized means of settling international controversies, namely, the seemingly irreconcilable interests of the belligerent, on the one hand, and of the neutral on the other, for the purpose of the belligerent is to crush the enemy by a direct blow, if possible, or by the slower but not less sure method of impoverishment and starvation. If the enemy is forced to rely upon his immediate resources, he may soon be exhausted and the war come to an abrupt end; for our experience in the Civil War shows that the nation in the field cannot in times of storm and stress create supplies of arms and ammunition necessary for a prolonged contest. If the neutral be permitted to supply arms and ammunition, he strengthens the army of resistance, and, if in addition he furnish food and clothing and the necessities of life, he not only supports the army in the field, but he recruits it by withdrawing labor from the factory and field, thus permitting it to enter the army and remove pressure upon non-combatants to conclude peace. The Civil War was not won upon the battlefield, as the layman would have us believe. Lee's army did not surrender at Appomattox because it was wasted in numbers and lacked arms and ammunition. The South fell because its resources were exhausted, its industry found no outlet, and its ports were closed to the neutral. Its courage was undaunted, its soldiers, although reduced in number, were eager for the conflict; its leaders, trained in the field and enriched by four years of experience, were able and willing to continue the contest; but the armies were destitute, the supplies were exhausted, and the empty stomachs overcame the indomitable will, the strong arm and the unconquerable purpose. The blockade of the Southern ports left the South dependent upon itself, and it fell. As the purpose of war is to overcome resistance, it is self-evident that the belligerent will not willingly renounce a right or a practice which weakens the enemy, and he will not, if he can prevent it, permit the neutral to become a base of supplies for the enemy. He will, therefore, subject neutral trade and commerce to close supervision; he will seize and confiscate arms and ammunition destined for the enemy port; he will prevent, as far as neutrals permit, trade in objects susceptible of warlike use; he will blockade enemy ports and prevent the in-

gress of supplies to replace the losses of war; and he will prohibit the egress of merchandise with which the wasted resources may be repaired. He will blockade the ports and isolate his enemy, and the contest thus limited will be a trial of endurance between the belligerents. On the other hand, the neutral will insist, and properly, that his industry and commerce be not ruined because two nations have been minded to break the peace, and he will maintain that he be not made a party to the war and suffer its losses and privations, unless by his own consent. The belligerents and the neutrals are thus opposed in their interests, for the belligerent seeks to restrain the industry and commerce of the neutral and to bring the enemy to terms, whereas the neutral proclaims the untrammeled freedom of trade. Both views cannot prevail. The past belongs to the belligerent; the neutral claims the present and the future as his own. A balance must be struck. And it is no small tribute to the London Naval Conference that it considered the rights and duties of both parties and devised a code reasonably acceptable to both.

JAMES BROWN SCOTT.

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EDITORIAL COMMENT

SECRETARY BRYAN'S PEACE PLAN

As the JOURNAL has devoted two editorial comments to Secretary Bryan's peace plan—that is to say, the conventions negotiated by him as Secretary of State with foreign countries, providing for commissions of inquiry to pass upon international disputes which may arise between them—it is not necessary to restate the terms of the treaties or the advantages which are expected to flow from their ratification and application in practice. The JOURNAL, however, is pleased to print the following list of countries, chronologically arranged, which have indicated

acceptance in principle of the peace plan up to June 29, 1914, furnished by the courtesy of the Secretary of State:

1. Italy
2. Great Britain
3. France
4. Brazil
5. Sweden
6. Norway
7. Russia
8. Peru
9. Austria-Hungary
10. Netherlands
11. Bolivia
12. Germany
13. Argentina
14. China
15. Dominican Republic
16. Guatemala
17. Haiti
18. Spain
19. Portugal
20. Belgium
21. Denmark
22. Chile
23. Cuba
24. Costa Rica
25. Salvador
26. Switzerland
27. Paraguay
28. Panama
29. Honduras
30. Nicaragua
31. Persia
32. Ecuador
33. Venezuela
34. Greece

The following is likewise an official list, furnished by the Secretary of State, of countries, chronologically arranged, which have entered into treaties endorsing the principles and details of the peace plan up to July 24, 1914:

1. Salvador	August 7, 1913
2. Guatemala	September 20, 1913
3. Panama	September 20, 1913
4. Honduras	November 3, 1913
5. Nicaragua	December 17, 1913
6. Netherlands	December 18, 1913
7. Bolivia	January 22, 1914
8. Portugal	February 4, 1914
9. Persia	February 4, 1914
10. Denmark	February 5, 1914
11. Switzerland	February 13, 1914
12. Costa Rica	February 13, 1914
13. Dominican Republic	February 17, 1914
14. Venezuela	March 21, 1914
15. Italy	May 5, 1914
16. Norway	June 24, 1914
17. Peru	July 14, 1914
18. Uruguay	July 20, 1914
19. Argentina	July 24, 1914
20. Brazil	July 24, 1914
21. Chile	July 24, 1914

Treaties with France and Great Britain have been agreed upon and will, it is expected, be signed in a few days. It is thus seen that twenty-one treaties have actually been signed, and on July 24, 1914, twenty of these were laid before the Senate for its advice and consent. As the Senate Committee on Foreign Relations has already approved them in principle, it is believed that they will shortly be ready for ratification. The treaty with Peru, owing to delay in transmission, will be sent to the Senate later.

The provisions of the treaties differ, although the principle is invariably the same, and through the courtesy of the Secretary of State the JOURNAL is enabled to give the text of what Mr. Bryan regards as representative of the entire group, namely, the convention between The Netherlands and the United States of December 18, 1913. The preamble states—and the preamble is true in this case—that the United States and Her Majesty the Queen of The Netherlands are "desirous to strengthen the bonds of amity that bind them together and also to advance the cause of general peace." It would be a waste of time to comment upon this simple sentence, for since the Jay Treaty of 1794, which introduced arbitration into the modern practice of nations, the United States has been a leader, as well as a pioneer in the peaceful settlement of international disputes, and since the meeting of the First Peace Conference at The Hague in 1899 Holland has been and is the center of international development. It is perhaps not too much to say that the little city of The Hague has become the unofficial capital of the society of nations.

It may be permissible to quote, in support of these views, a passage from an address of Mr. Frederic R. Coudert, introducing His Excellency Mr. Loudon, then Netherland Minister to the United States, but now Minister of Foreign Affairs of his country, who in his present capacity authorized the Netherland Minister to negotiate the treaty in question with the United States:

> There is in Europe one country—I was going to say a little country, but that is not the word, because if bigness consists of high principles, if it consists of altruism, if it consists of spiritual power, if it consists of standing for the right and for fairness among men, then Holland is a great country, and always has been. It was great in the days when the military ideal stood high, and, if I remember rightly, none other than Hollanders were accustomed to carrying brooms at their mastheads in a certain historic channel. But times pass along, and having excelled in the ideals of the Middle Ages, they left them to excel in the ideals of modern times.[1]

[1] Proceedings, American Society of International Law (1913), pp. 265–266.

But to the treaty. By its first article

> The high contracting parties agree that all disputes between them, of every nature whatsoever, to the settlement of which previous arbitration treaties or agreements do not apply in their terms or are not applied in fact, shall, when diplomatic methods of adjustment have failed, be referred for investigation and report to a permanent international commission, to be constituted in the manner prescribed in the next succeeding article; and they agree not to declare war or begin hostilities during such investigation and before the report is submitted.

It is believed that this article defines in the clearest and most unmistakable language the relation of the international commission to arbitration, for it is expressly stated that diplomatic methods shall have been used to produce agreement and that they have failed; that arbitration is not rejected in favor of a commission, because the disputes to be submitted to it are either those not covered by a treaty of arbitration, or, if included, are not actually arbitrated. That is to say, disputes of whatsoever nature, not included in arbitration treaties, are to be submitted to the commission, so that the new agency is to supplement the defects or shortcomings of such treaties and to bring to discussion all matters of controversy between the two countries in excess of the obligation assumed in treaties of arbitration.

As will be seen in Article III, the two countries do not confuse the proceedings before the commission with the consequences of arbitration, because the commission reports; the arbitral tribunal decides. The contracting parties believe, and it would appear properly, that a report based upon careful investigation is tantamount to a settlement, and it is to be hoped that this belief will be justified by the facts. It will be noted that the concluding clause of Article I provides that war shall not be declared or hostilities begun before the report of the commission is submitted. While war between The Netherlands and the United States is unthinkable, such an agreement is far from useless. Its very presence is an invitation to other nations, with which war is not unthinkable, to investigate before they fight, or rather to investigate instead of fighting. Its presence in many instruments of this kind will reinforce its influence in this one, and it will be harder in the future than in the past to refuse the reasonable demand of a foreign nation to submit a controversy such as the blowing up of the *Maine* to an international commission of inquiry.

The next article deals with the composition of this important body:

The international commission shall be composed of five members, to be appointed as follows: One member shall be chosen from each country, by the government thereof; one member shall be chosen by each government from some third country; the fifth member shall be chosen by common agreement between the two governments, it being understood that he shall not be a citizen of either country. The expenses of the commission shall be paid by the two governments in equal proportion.

The international commission shall be appointed within six months after the exchange of the ratifications of this treaty; and vacancies shall be filled according to the manner of the original appointment.

In the first place, it is to be observed that the commission is to be permanent (Article I); that, although each country is to be represented in it by a citizen or subject of its choice, the other members, including the fifth, who may probably be chairman, are to be foreigners, so that control of the national element is excluded; for, say what we will, a citizen or subject remains in international matters a citizen or subject. His presence in a commission of this kind, however, may well be helpful rather than detrimental, because the report, as will be seen in Article III, is not binding upon the governments. This article is very important, because it contains an obligation on the part of the governments and vests the commission with the initiative, if the governments do not themselves lay the dispute before it. But it will be well to quote the article in full before commenting upon it:

In case the high contracting parties shall have failed to adjust a dispute by diplomatic methods, they shall at once refer it to the international commission for investigation and report. The international commission may, however, spontaneously offer its services to that effect, and in such case it shall notify both governments and request their co-operation in the investigation.

The high contracting parties agree to furnish the Permanent International Commission with all the means and facilities required for its investigation and report.

The report of the international commission shall be completed within one year after the date on which it shall declare its investigation to have begun, unless the high contracting parties shall limit or extend the time by mutual agreement. The report shall be prepared in triplicate; one copy shall be presented to each government, and the third retained by the commission for its files.

The high contracting parties reserve the right to act independently on the subject-matter of the dispute after the report of the commission shall have been submitted.

The first sentence should be construed with Article I, for standing alone, it might seem that arbitration was to be excluded. By so doing it appears that, if there be no treaty of arbitration covering the dispute, or if the duty to arbitrate has not been complied with, diplomacy is not to drag on interminably, for upon its failure the governments agree to

refer the dispute "at once" for investigation and report. It may happen, however, that one of the governments may be unwilling to do this and, were it not for the second sentence of Article III, we would have, as it were, a deadlock. This sentence, however, allows the commission on its own initiative—"spontaneous" is the word in the text—"to offer its services," and the second paragraph of the article apparently binds the contracting parties to furnish the commission "with all the means and facilities required for its investigation and report" as fully as if the reference were with the consent and upon the motion of the two governments. There would seem, therefore, to be no escape from arbitration, on the one hand, if a treaty exists, or from the investigation and report of a commission, whether the government will or no. Herein lies the great importance of the treaties, for investigation must in many cases amount to settlement; for no nation, however powerful, can in the long run withstand public opinion, and public opinion will no doubt be created by this article.

It will be observed that the provision found in some of the treaties not to declare war and begin hostilities within a year, absent in express terms from this treaty, is nevertheless read into it indirectly, for the commission has, by Article III, a year after the beginning of its investigation to prepare its report. The advantage of such a provision is too evident to need comment.

The concluding paragraph of Article III is hardly less important than the power of the commission to act spontaneously—that is, on its own initiative—and this although it does not attach any obligation on the part of the governments to put into effect the conclusions of the report. Indeed this seeming defect is its crowning glory, for we know from every-day experience how unwilling we are to do that which we are bound to do, and how often we do voluntarily what we do not need to do. There is no escape from the investigation, for, if the governments are recalcitrant, the commission itself may step in, and it is interesting to note that in public documents "may" is not permissive, but mandatory. If therefore the case is before the commission, and its submission does not depend upon the two governments or upon their national representatives, for they are a minority of two in a body of five, a report is inevitable, supposing that the foreign members are set upon a report, and it is believed that compliance with the report is inevitable, because of the pressure of public opinion which will be in this case enlightened.

For the sake of completeness Article IV is quoted, although the last two paragraphs of it deal with its signature:

> The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof; and by Her Majesty the Queen of the Netherlands; and the ratifications shall be exchanged as soon as possible. It shall take effect immediately after the exchange of ratifications, and shall continue in force for a period of five years; and it shall thereafter remain in force until twelve months after one of the high contracting parties have given notice to the other of an intention to terminate it.
>
> In witness whereof the respective plenipotentiaries have signed the present treaty and have affixed thereunto their seals.
>
> Done in Washington on the eighteenth day of December, in the year of our Lord nineteen hundred and thirteen.

The treaty, it will be noted, is concluded for a period of five years, but in reality it is for six years, as it remains in force for a twelvemonth after one or the other party may have given notice of an intention to terminate it.

From this brief analysis of the convention, it is evident that it does not interfere with any existing agency of peace, because the nations are always free, through the channels of diplomacy, to adjust their disputes by direct negotiations or by some other means, if they so desire. Arbitration is expressly reserved, so that the present treaty supplements, but does not modify, a duty to arbitrate. It does bind the nations, however, to submit their other disputes without reservation to the investigation and report of a permanent commission, which can act upon their mutual request, or indeed without their request, and Mr. Bryan is to be congratulated upon having secured the discussion of all disputes between the contracting parties, not otherwise provided for, by the apparently simple yet effective device of an investigation and report, which is believed to be tantamount to settlement.

THE AMERICAN-JAPANESE DISCUSSIONS RELATING TO THE LAND TENURE LAW OF CALIFORNIA

The question of the California land tenure law as it affects the subjects of Japan has recently again been brought into prominence and in a way to attract as much as possible the attention of the public in the two countries. It seems that, after the exchange of diplomatic notes last year between the Secretary of State and the Japanese Ambassador

at Washington, the two Governments entertained a proposal to adjust the matter by the conclusion of a special convention. How far negotiations looking to this end had progressed has not been divulged. In any event, the proposed solution was apparently not relished in Japan, for, with the change in the ministry at Tokio, came also a change in the attitude of the Government there. This was indicated in an instruction from the Minister for Foreign Affairs to the Japanese Ambassador at Washington, delivered to the Department of State on June 10, 1914, in which the Minister for Foreign Affairs, referring to the proposed convention, stated that it appeared to be calculated to create new difficulties instead of composing existing misunderstandings. He therefore declined to proceed with the negotiations and requested a continuance of the previous correspondence looking toward a diplomatic settlement. At the same time, he suggested that the correspondence be made public, in the belief that fuller and more accurate information regarding the matter will contribute to the final settlement of the controversy. The correspondence was, accordingly, given to the press by the Secretary of State a few days later, and the exact issues between the two Governments are for the first time available for public discussion and consideration.

The act of the legislature of California which is the subject of the controversy is entitled "An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this State, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts or parts of acts inconsistent or in conflict herewith." The act was approved on May 19, 1913, and constitutes Chapter 113 of the Statutes of California. Briefly, the act provides that all aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in the same manner and to the same extent as American citizens; but that all other aliens shall have and enjoy such rights with respect to real property in the manner and to the extent and for the purposes prescribed by any treaty now existing between the governments of such aliens and the United States, and may in addition thereto lease lands for agricultural purposes for a term not exceeding three years. The act includes companies, associations and corporations and provisions are inserted for the sale of real property and distribution of the proceeds where the heir or devisee is disqualified to take under the act and for the escheat of real prop-

erty acquired by companies, associations or corporations, in violation of the act. The act is printed in the supplement to this JOURNAL, page 177.

Upon the passage of the act by the legislature and before its approval by the Governor, the Japanese Ambassador at Washington on May 9, 1913, filed a protest with the Department of State, in which he termed the act as "unfair, unjust, inequitable and discriminatory," "primarily directed against Japanese and prejudicial to their existing rights," "inconsistent with the provisions of the treaty in force," and "opposed to the spirit and fundamental principles of amity and good understanding upon which the conventional relations of the two countries depend." He then enumerated certain specific objections to the legislation, which will be discussed later on. The Secretary of State replied on May 19th, stating that Japan had been misled in its interpretation of the spirit and object of the legislation; that it is not political nor a part of any general national policy of unfriendliness. He referred to the efforts of the President and himself to induce the California legislature to modify the legislation, which, he stated, was wholly economic and based upon the particular economic conditions existing in California.

The Japanese Ambassador cabled the Secretary's reply to his Government and on June 4th, by its direction, he presented another note, accompanied by an aide-mémoire and telegram from the Minister for Foreign Affairs, in which the previous objections were maintained and the law referred to as "intentionally racially discriminatory," and, basing his statement on the small number of Japanese who own land and the inconsiderable amount of such land and the annually decreasing number of Japanese who enter the United States, he denied that the law had any economic basis. On July 16th, the Secretary of State replied in detail and likewise accompanied his note with an aide-mémoire. In reply to the allegation that the legislation was racially discriminatory, the Secretary of State said:

> I can not help feeling that in the representations submitted by your excellency the supposition of racial discrimination occupies a position of prominence which it does not deserve and which is not justified by the facts. I am quite prepared to admit that all differences between human beings—differences in appearance, differences in manner, differences in speech, differences in opinion, differences in nationality, and differences in race—may provoke a certain antagonism; but none of these differences is likely to produce serious results unless it becomes associated with an interest of a contentious nature, such as that of the struggle for existence. In this economic contest the division no doubt may often take place on racial lines, but it does so not because of racial antagonism but because of the circumstance that the traditions

and habits of different races have developed or diminished competitive efficiency. The contest is economic; the racial difference is a mere mark or incident of the economic struggle.

All nations recognize this fact, and it is for this reason that each nation is permitted to determine who shall and who shall not be permitted to settle in its dominions and become a part of the body politic, to the end that it may preserve internal peace and avoid the contentions which are so likely to disturb the harmony of international relations.

In support of this statement he cited the exclusion of Chinese laborers from Japan, under an Imperial ordinance of 1899, and added:

The Department is, however, far from imputing to the Imperial Government in its enforcement of the ordinance a design to make a racial discrimination. On the contrary, the Department assumes that the question with which the Imperial Government were seeking to deal was in its essence economic and racial only incidentally, and that this would continue to be the case even if the ordinance, although it was no doubt originally designed to exclude Chinese laborers, should be applied to laborers of another race.

The reply to this note was the last communication in the correspondence prior to the consideration of the proposal for a new treaty. It was delivered to the Department of State on August 26, 1913, and in it the Minister for Foreign Affairs stated that the gravamen of the Japanese complaint is that the legislation is "*ex industria* discriminatory against this Empire as compared with other states" and "mortifying to the nation and disregardful of the national susceptibilities of the Japanese people." He added:

Whatever causes may have been responsible for the measure, it can not be denied that, in its final manifestation, it is clearly indicative of racial antagonism. Nor, in the opinion of the Imperial Government, can any justification for such enactment be found in the assertion that it was "the emanation of economic conditions." It is the high office of modern treaties of commerce to prevent undue international discriminations, and the most favored nation principle, which finds a place in nearly all such compacts, has had the effect, in an international sense, of equalizing opportunities in all the various avenues of commercial and industrial life. It is true that special privileges are, in exceptional circumstances, sometimes granted by one nation in favor of another, but the present case stands out, it is believed, as the one single instance without historical parallel, in which a state maintaining, by treaty, the reciprocal most favored nation relations with another state, has ever, in a matter such as that under discussion, essayed to discriminate against such other state, as compared with third powers with which no such relations exist.

The Ambassador further added that his Government did not understand the reason or necessity for the allusion to the exclusion of Chinese laborers from Japan for "the question of immigration has nothing what-

ever to do with the present controversy, and any reference to it only tends to obscure the real issue." He referred to the satisfaction with which both Governments viewed the existing arrangement concerning the emigration of laborers to the United States and said:

> In order to correct and finally dispel the popular error, I wish to say that there is no question whatever between Japan and the United States on the subject of the Japanese labor immigration into the United States. The present controversy relates exclusively to the question of the treatment of the Japanese subjects who are lawfully in the United States or may hereafter lawfully become resident therein consistently with the existing regulations.

Japan specifically objects to the California legislation because, it is asserted, it threatens the rights vested in Japanese subjects under the treaty of commerce and navigation of November 22, 1894, and impairs the rights and privileges granted to them by the treaty of commerce and navigation of February 21, 1911, which superseded the former treaty. Both treaties are printed in full in the supplement to this JOURNAL, Volume 5, pages 100, 106. The United States denies generally that these allegations are well founded, and points to the express terms of the law which purport to respect and preserve all existing treaty rights. If the law fails to do this, it is pointed out that treaties are the supreme law of the land and rights acquired under them will be protected and enforced in the courts, both State and Federal. While admitting that an effort was made to bring the law into accord with treaty stipulations, the Japanese contend that the actual provisions of the law can not be reconciled with those stipulations. As to the suggestion that the question be referred to the courts, Japan declines to accept it on two grounds: first, because the question at issue is between the two Governments as to the true intent and meaning of the treaty, a question properly amenable to ordinary diplomatic processes; and, secondly, because the burden of the delay and hardships involved in private litigation, not being thrown upon other aliens, will work to the disadvantage of the Japanese and operate as a discrimination. The counter-suggestion is made that any procedure in the courts looking to the preservation of treaty rights should be initiated by the Federal Government, to which the United States replies that questions concerning private titles to land, whether such titles be assured by treaty or not, are adjudicated upon the suit of the parties in interest, without any interposition on the part of the United States Government, and it gives reasons why such practice works greatly to the advantage of the individual suitors.

In this connection, Japan raises the further question as to what will become of the rights which Japanese subjects now have in California under the treaty and the law in case the treaty should cease to be in force, and points out that the rights assured to other aliens in this respect are not dependent upon treaty engagements. As to this, the Secretary of State assures the Ambassador that, in the event of such a contingency, the Government of the United States would safeguard the rights now secured by treaty.

More particularly, the Japanese Government alleges that the legislation violates the express stipulations of the treaty of commerce and navigation of 1911 in the following respects:

(a) That so far as the act takes away from Japanese subjects the capacity, hitherto freely enjoyed by them, to acquire, by devise and descent, houses for all purposes, and leasehold of land for residential and commercial purposes, it is in conflict with the first clause of Article I of said treaty, since that clause accords to Japanese subjects liberty to own houses and to lease lands upon the same terms as American citizens, and it will not be contended that the liberty of such citizens in that respect has been annulled or abridged;

(b) That, so far as the act deprives Japanese subjects of the capacity to bequeath and transmit to their devisees and heirs real property and interest therein, duly acquired by them under said treaty, it is inconsistent with the first and third clauses of Article I, since, in addition to the guarantee of equal treatment which is contained in the first clause above mentioned, property of Japanese subjects is, by the third clause aforesaid, assured of the same most constant protection, the same equal protection of equal laws, that is accorded to the property of American citizens, and it goes without saying that property rights of such citizens still remain complete and undisturbed; and

(c) That, so far as the act takes away from Japanese subjects the capacity of bequeathing and transmitting real property and interest therein, already duly acquired by them under the laws of California, it is repugnant to the above-mentioned third clause of Article I of the treaty, since it impairs obligations of the contracts under which such property was acquired and is held, and thus deprives Japanese subjects of that equal protection for their property which the treaty extends to them.

It is also contended:

(d) That the act in question, so far as it takes away from Japanese subjects the right to dispose, in any manner whatsoever, of the real property or interest therein, lawfully acquired by them prior to July 17, 1911 [the date on which the treaty of 1911 went into effect], is an impairment of vested rights created under the treaty of 1894.

(e) That the legislation discriminates against Japanese subjects not only as compared with American citizens, but as compared with the subjects of other countries, and is therefore a denial of the most favored nation treatment guaranteed by Article XIV of the treaty.

The United States answers:

(a) That Article I of the treaty, which refers to real property, makes no reference to the ownership of land, but merely stipulates that the citizens or subjects of the contracting parties shall have the liberty "to own or lease and occupy houses, manufactories, warehouses, and shops" and "to lease land for residential purposes."

The Secretary continues:

> The question of the ownership of land was, in pursuance of the desire of the Japanese Government, dealt with by an exchange of notes in which it was acknowledged and agreed that this question should be regulated in each country by the local law, and that the law applicable in the United States in this regard was that of the respective States. This clearly appears from the note of Baron Uchida to Mr. Knox of February 21, 1911, in which, in reply to an inquiry of the latter on the subject, Baron Uchida said:
>
> > "In return for the rights of land ownership which are granted Japanese by the laws of the various States of the United States [of which, I may observe, there are now about 30] the Imperial Government will by liberal interpretation of the law be prepared to grant land ownership to *American citizens from all the States, reserving for the future, however, the right of maintaining the condition of reciprocity with respect to the separate States.*"

From the foregoing the Secretary of State concludes:

> First, that the California statute, in extending to aliens not eligible to citizenship of the United States the right to lease lands in that State for agricultural purposes for a term not exceeding three years, may be held to go beyond the measure of privilege established in the treaty, which does not grant the right to lease agricultural lands at all; and secondly, that, so far as the statute may abridge the right of such aliens to own lands within the State, the right has been reserved by the Imperial Government to act upon the principle of exact reciprocity with respect to citizens of the individual State. In a word, the measure of privilege and the measure of satisfaction for its denial were perfectly understood and accepted.

(b) The Department reiterates its assertion that, inasmuch as the California statute in express terms requires the recognition of treaty rights, it is not to be assumed that any such right would not be fully protected.

(c) That the Japanese contention extends "too far the theory that the ownership of property carries with it a vested right to dispose of such property in all the ways in which property may be transferred, by sale, by gift, or devise, or by descent, without future limitation or restriction." It is added that "such a theory would render it impossible

for a country to alter its laws with regard to the transmission of property."

(d) As to the fear of the Japanese Government that vested rights of property are impaired by the statute, the Secretary of State assures that Government that such rights will be fully protected by the courts. He goes further and states that:

> If a case should ever be disclosed in which it was maintained by the Imperial Government that the existing property rights of one of its subjects had been impaired by the statute, this Government would stand ready to compensate him for any loss which he might be shown to have sustained, or even, in order to avoid any possible allegation of injury, to purchase from him his lands at their full market value prior to the enactment of the statute.

(e) In answer to the allegation that the act is repugnant to the most favored nation clause of the treaty, the Department points out that most favored nation clauses universally relate to matters of commerce and navigation; that the alien ownership of land has seldom been treated in the practice of the United States as a matter of most favored nation treatment but has been secured only by special treaty stipulations.

In the course of the discussion the Japanese Ambassador referred to the naturalization laws of the United States under which, he stated, "Japanese subjects are as a nation, apparently denied the right to acquire American nationality." This, he said, was "mortifying to the Government and people of Japan, since the racial distinction inferable from those provisions is hurtful to their just national susceptibilities." In reply, the Secretary of State denied that the naturalization laws of the United States make any distinction that may be considered as national, and stated that an historical examination of them would show that the Government and people of Japan have no ground to feel that any discrimination against them was intended. Inasmuch as the Ambassador had acknowledged that the question of naturalization "is a political problem of national and not international concern," the subject was not further alluded to.

From the point of view of international law, the issues thus raised between the two governments are very interesting and important, but it would not be possible within the limits of these columns to enter into a discussion of the questions involved with any expectation of satisfactorily treating them. The correspondence has been summarized in such a way, it is hoped, as to give to our readers a clear idea of the problem before the two governments for solution.

MEDIATION IN MEXICO

A comment on the situation in Mexico at the time of going to press (July 1) must necessarily be fragmentary and unsatisfactory, because of the lack of authentic and official information. It seems unwise, however, not to note the changes in the situation since the last comment, which appeared in the October number of the JOURNAL for 1913; but any statements made are subject to correction, and it seems only fair to inform the reader of this fact.

Leaving aside for the moment the mediation of Argentina, Chile, and Brazil, the events of the past few months have not changed materially the attitude of the United States. It has refused, and does still refuse, to recognize General Huerta's government. The General has steadily refused to comply with the suggestions of the United States that elections be held and that he be not a candidate and he still controls the City of Mexico and a large portion of the country. General Carranza, the choice of the Constitutionalists for President, exercises the functions of such within the territory opposed to the Huerta régime, and the leader of the constitutionalist army in the field, General Villa, has had many notable successes, including the taking of Zacatecas, claimed to be the key to the City of Mexico.

The United States stands ready to recognize any government which, in its opinion, represents the Mexican people and which in fact exercises authority throughout the country. General Huerta appears steadily to have lost ground. The Constitutionalists appear to have gained; but neither party has as yet obtained or exercises that control which, in the opinion of the United States, would justify its recognition as the actual and existing government of Mexico. Such appears to be the situation, irrespective of mediation.

It is therefore necessary to inquire what change has been produced by mediation and the results which have already flowed from it. To understand, however, the task of the mediators it is necessary to consider some events which may be said to have led up to it. President Wilson stated in his address to Congress on August 27, 1913,[1] that he would observe a strict impartiality in his treatment of the contending factions. He said:

> I deem it my duty to exercise the authority conferred upon me by the law of March 14, 1912, to see to it that neither side to the struggle now going on in Mexico

[1] American Journal of International Law, Supplement, 1913, pp. 279 *et seq.*

receive any assistance from this side of the border. I shall follow the best practice of nations in the matter of neutrality by forbidding the exportation of arms or munitions of war of any kind from the United States to any part of the Republic of Mexico —a policy suggested by several interesting precedents and certainly dictated by many manifest considerations of practical expediency. We can not in the circumstances be the partisans of either party to the contest that now distracts Mexico, or constitute ourselves the virtual umpire between them.

Had President Wilson recognized the government of General Huerta, the forces of Carranza and his followers, so far as the United States is concerned, would have been regarded as rebels in arms against a legitimate government. The situation was anomalous in that neither party having been recognized, there existed, in the view of the United States, no legal government. President Wilson, therefore, considered that the proclamation putting into effect the law of March 14, 1912, operated against the Constitutionalist party and in favor of General Huerta and his partisans, who, recognized as the legitimate government by many nations, were in a position to obtain arms and ammunition. Therefore, on February 3, 1914, he withdrew the embargo on the importation of arms into Mexico, thus placing, as far as he could, the contending factions upon an equality. So matters stood until April 9, 1914, when certain blue-jackets from the United States man-of-war *Dolphin* were arrested at Tampico. The facts surrounding this incident and the conclusions drawn from them are stated in the President's address to Congress of April 20, 1914:

On the 9th of April a paymaster of the U. S. S. *Dolphin* landed at the Iturbide Bridge landing at Tampico with a whaleboat and boat's crew to take off certain supplies needed by his ship, and while engaged in loading the boat was arrested by an officer and squad of men of the army of Gen. Huerta. Neither the paymaster nor anyone of the boat's crew was armed. Two of the men were in the boat when the arrest took place, and were obliged to leave it and submit to be taken into custody, notwithstanding the fact that the boat carried, both at her bow and at her stern, the flag of the United States. The officer who made the arrest was proceeding up one of the streets of the town with his prisoners when met by an officer of higher authority, who ordered him to return to the landing and await orders; and within an hour and a half from the time of the arrest orders were received from the commander of the Huertista forces at Tampico for the release of the paymaster and his men. The release was followed by apologies from the commander and later by an expression of regret by Gen. Huerta himself. Gen. Huerta urged that martial law obtained at the time at Tampico; that orders had been issued that no one should be allowed to land at the Iturbide Bridge; and that our sailors had no right to land there. Our naval commanders at the port had not been notified of any such prohibition; and, even if they had been, the only justifiable course open to the local authorities would

have been to request the paymaster and his crew to withdraw and to lodge a protest with the commanding officer of the fleet. Admiral Mayo regarded the arrest as so serious an affront that he was not satisfied with the apologies offered, but demanded that the flag of the United States be saluted with special ceremony by the military commander of the port.

It appeared that General Huerta was willing to fire a salute of twenty-one guns, but insisted that the United States should fire a like salute, and that the guns of the respective countries should be fired alternately. This suggestion was unacceptable to the United States, and the President, after setting forth the facts surrounding the incident and calling attention to acts of aggression on the part of General Huerta, thus continued:

I therefore come to ask your approval that I should use the armed forces of the United States in such ways and to such an extent as may be necessary to obtain from Gen. Huerta and his adherents the fullest recognition of the rights and dignity of the United States.

Objection was made in Congress to the fact that the flag incident, however unpardonable, was not in itself a sufficient justification for the use of the armed forces of the United States, and that instead of confining the use of the armed forces to this incident and to their use against General Huerta and his followers, the resolution should be broadened by such an enumeration of events in Mexico as might in after days justify the United States before the bar of history. This view was especially voiced by Senator Root, who said on this point:

The insult to the flag is but a part—the culmination, if you please—of a long series of violations of American rights, a long series of violations of those rights which it is the duty of our country to protect—violations not, for the most part, of government, but made possible by the weakness of government, because through that country range bands of freebooters and chieftains like the captains of free companies, without control or responsibility. Lying back of this incident is a condition of things in Mexico which absolutely prevents the protection of American life and property except through respect for the American flag, the American uniform, the American Government.

It is that which gives significance to the demand that public respect shall be paid to the flag of the United States. There is our justification. It is a justification lying not in Victoriano Huerta or in his conduct alone, but in the universal condition of affairs in Mexico. The real object to be attained by the course which we are asked to approve is not the gratification of personal pride; it is not the satisfaction of an admiral or a Government. It is the preservation of the power of the United States to protect its citizens under those conditions.

If we omit from the resolution that shall be passed to-night all reference to the

matters that are enumerated in the substitute, we omit the real object which forms the only justification for action. Without that, sir, upon the showing of the resolution reported by the committee we would be everlastingly wrong. With the facts that are enumerated in the substitute the action of the United States will rest with becoming sense of proportion and national dignity upon adequate foundation and cause.

The proposition to amend the resolution proposed by the House in such a way as to include the Mexican situation in its entirety, instead of obtaining reparation for the conduct of General Huerta, referred to in the President's address, was voted down, and on April 22, 1914, the following joint resolution was passed:

In view of the facts presented by the President of the United States in his address delivered to the Congress in joint session on the twentieth day of April, nineteen hundred and fourteen, with regard to certain affronts and indignities committed against the United States in Mexico: Be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is justified in the employment of the armed forces of the United States to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States.

Be it further resolved, That the United States disclaims any hostility to the Mexican people or any purpose to make war upon Mexico.

In the meantime, Admiral Fletcher, commanding the American navy off Vera Cruz, was directed by the President to land a force of marines at that place and to seize the customs house so as to prevent expected arms and ammunition from Germany from falling into the hands of Huerta and his followers. This was done on April 21, 1914, with a loss on the part of the United States of four killed and twenty wounded. The next day General Huerta handed his passports to Mr. O'Shaughnessy, the chargé d'affaires ad interim of the United States, who had remained in the Mexican capital, and General Carranza declared the seizure of Vera Cruz an act of hostility. President Wilson answered the action of the Mexican aspirant for the presidency by restoring on the 23rd the embargo on arms which he had withdrawn on February 3, 1914.

So matters stood on April 25, 1914; but forces were at work to prevent a continuation of hostilities between the United States and General Huerta. At the banquet of the American Society of International Law on the evening of this day, Secretary of State Bryan announced the offer and acceptance of the good offices of the diplomatic representatives

of Argentina, Brazil and Chile. Mr. Bryan first read the offer and followed it with his reply:

Mr. Secretary of State:

With the purpose of subserving the interests of peace and civilization in our continent, and with the earnest desire to prevent any further blood-shed, to the prejudice of the cordiality and union which have always surrounded the relations of the governments and peoples of America, we, the plenipotentiaries of Brazil, Argentina, and Chile, duly authorized thereto, have the honor to tender to your Excellency's Government our good offices for the peaceful and friendly settlement of the conflict between the United States and Mexico.

This offer puts in due form the suggestions which we had occasion to offer heretofore on the subject to the Secretary, to whom we renew the assurances of our highest and most distinguished consideration.

D. da Gama,
R. S. Naon,
Eduardo Suarez Mujica.

To this important document Mr. Bryan replied as follows:

The Government of the United States is deeply sensible of the friendliness, the good feeling, and the generous concern for the peace and welfare of America manifested in the joint note just received from your Excellencies, tendering the good offices of your Governments to effect, if possible, a settlement of the present difficulties between the Government of the United States and those who now claim to represent our sister Republic of Mexico.

Conscious of the purpose with which the proffer is made, this Government does not feel at liberty to decline it. Its own chief interest is in the peace of America, the cordial intercourse of her republics and their people, and the happiness and prosperity which can spring only out of frank, mutual understandings and the friendship which is created by common purpose.

The generous offer of your Governments is therefore accepted. This Government hopes most earnestly that you may find those who speak for the several elements of the Mexican people willing and ready to discuss terms of satisfactory, and therefore permanent, settlement. If you should find them willing, this Government will be glad to take up with you for discussion in the frankest and most conciliatory spirit any proposals that may be authoritatively formulated, and will hope that they may prove feasible and prophetic of a new day of mutual co-operation and confidence in America.

This Government feels bound in candor to say that its diplomatic relations with Mexico being for the present severed, it is not possible for it to make sure of an uninterrupted opportunity to carry out the plan of intermediation which you propose. It is, of course, possible that some act of aggression on the part of those who control the military forces of Mexico might oblige the United States to act, to the upsetting of hopes of immediate peace; but this does not justify us in hesitating to accept your generous suggestion.

We shall hope for the best results within a time brief enough to relieve our anxiety

lest ill-considered hostile demonstrations should interrupt negotiations and disappoint our hopes of peace.

On April 26th General Huerta accepted mediation and appointed delegates. The mediators, with representatives of General Huerta and of the United States, met at Niagara in Canada on May 20th. The mediators invited General Carranza to participate in the proceedings by appointing and sending delegates, and asked both parties to proclaim an armistice. The Huertista delegates appeared and General Huerta declared an armistice in accordance with the request of the mediators. General Carranza did not send delegates nor did he consent to an armistice. Notwithstanding this fact, the representatives of the three powers, of General Huerta and of the United States met in conference. The incident of the flag seems to have been brushed aside, and larger measures of a kind to restore order were considered. General Huerta agreed to withdraw as President and thus open the way for settlement. General Carranza, however, was unwilling and continues so at the present writing to send delegates or to participate in a conference which would discuss the internal conditions of Mexico, as he regards such questions as matters solely for the people of Mexico to determine. He has been, however, willing to discuss the flag incident and to make adequate reparation, as the constitutional President of Mexico.

It cannot be said, however, that the labors of the mediators have been in vain, for a continuation of hostilities between the United States, on the one hand, and General Huerta and his supporters, on the other, has been prevented, and a protocol, agreed to by the representatives of the United States and of General Huerta, was drawn up and signed by the mediators and the delegates on June 24, 1914. This protocol is as follows:

Article 1.—The provisional government referred to in the protocol No. 3 shall be constituted by agreement of the delegates representing the parties between which the internal struggle in Mexico is taking place.

Article 2.—(a) Upon the constitution of the provisional government in the City of Mexico the Government of the United States of America will recognize it immediately, and thereupon diplomatic relations between the two countries will be restored.

(b) The Government of the United States of America will not in any form whatsoever claim a war indemnity or other international satisfaction.

(c) The provisional government will proclaim an absolute amnesty to all foreigners for any and all close political offenses committed during the period of civil war in Mexico.

(d) The provisional government will negotiate for the constitution of international

commissions for the settlement of the claims of foreigners on account of damages sustained during the period of civil war, as a consequence of military acts or the acts of national authorities.

Article 3.—The three mediating governments agree on their part to recognize the provisional government organized as provided by section 1 of this protocol.

As far as the United States and General Huerta's government are concerned, the differences between them appear to be adjusted. The internal questions are relegated to the Mexicans for such decision as they may deem proper to take. The mediators therefore adjourned on June 30th, in order to allow the representatives of the contending Mexican factions to come together and agree upon terms acceptable to them, with the understanding that the mediators will reassemble in order to put the agreements into formal and final shape. Whether the adjournment is temporary or *sine die*, it is impossible to say at present. In any event there appears to be no immediate prospect of a resumption of hostilities against General Huerta's government, and representatives of Latin America have been called into conference to settle American controversies.

THE ORIGIN AND PURPOSE OF THE PLATT AMENDMENT

From time to time the Platt Amendment is referred to as indicating the policy which the United States should adopt toward the Latin American states in and bordering on the Caribbean Sea and to the north of the Panama Canal. In view of this fact, it seems proper to state the origin and nature of the amendment, the purposes for which it was devised, and the interpretation put upon it by the United States and accepted by Cuba, so as to see whether the amendment is capable of a larger usefulness in the field of international relations.

It frequently happens that persons in public life are credited with projects which they did not originate, and naturally so, as the superior must needs accept responsibility for a line of conduct which he carries out, even although it may have been proposed in the first instance by a subordinate. The authorship is merged in the result. This is necessarily so in questions of administration. It should not be so in questions of policy outlined by the head of a department, either as regards the President, whose approval is necessary, or as regards Congress, whose action is required for legislation.

The so-called Platt Amendment is a striking example of this. It was thought out by Mr. Root as Secretary of War. It was contained

in all its essentials in Secretary Root's letter of instructions, dated February 9, 1901,[1] to General Wood, the Military Governor of Cuba. This important document, which gives in detail the reasons for the proposed amendment, was submitted by President McKinley to his cabinet and approved by the President and his advisers, and thus approved, was handed by President McKinley, in the presence of the Secretary of War, to the late Senator Orville H. Platt, of Connecticut, to be introduced into Congress and incorporated in the legislation required for the transfer of Cuba to its people. Senator Platt introduced the amendment, as requested, and it is attached as a proviso to the act of March 2, 1901, entitled "An act making appropriation for the army for the fiscal year ending June thirtieth, nineteen hundred and two."

The amendment was formally communicated by the Military Governor, acting under instructions of the War Department, to the Cuban convention, then in session, assembled to draft a constitution for the young republic, and it was briefly and officially interpreted by Mr. Root as Secretary of War in a despatch, dated April 3, 1901, to the Military Governor and by him communicated to a committee of the constitutional convention. On June 12, 1901, the amendment was adopted, *in expressis verbis*, by the convention as an appendix to the constitution. The constitution was promulgated, with the amendment as an integral part thereof, and went into force on May 20, 1902. The Military Governor transferred the government of Cuba to its people on May 20, 1902; the American army of occupation withdrew on the afternoon of the same day; and on May 22, 1903, a treaty was concluded between Cuba and the United States, incorporating the Platt Amendment, *in expressis verbis*, which, approved by the Senate, was proclaimed as the law of the land on July 2, 1904.

It is believed that the sequence of events thus briefly stated shows that the amendment originated in the War Department; that its author was the then Secretary of War, Mr. Root; and that Senator Platt, possessing the confidence of the administration, introduced the amendment which bears his name, an amendment thought out, drafted, and incorporated in the Cuban constitution by the initiative and skill, the wisdom and foresight of Mr. Root when Secretary of War. It is not the purpose of the present comment, however, to question the services rendered by Senator Platt, but it seems eminently proper to state, by way of introduction, that the amendment, which bears his honored name—and

[1] See Annual Reports of the Secretary of War, 1899–1903, pp. 187 *et seq.*

properly enough, because it was introduced by him as an amendment to the Army bill—was nevertheless the work of Mr. Root.

But to return to the subject in hand. The determination of the United States that Cuba should be free and independent was stated in clear and unmistakable terms in the joint resolution of Congress, approved by President McKinley April 20, 1898, authorizing him to use the land and naval forces of the United States against Spain, and the authorization was coupled with an express disclaimer to acquire the island which the army and navy of the United States were to free from Spain. The relevant portions of the resolutions are:

> First, that the people of the island of Cuba are and of right ought to be free and independent. * * *
>
> Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island.

As a result of the use of the land and naval forces of the United States for the purposes set forth in the joint resolution, Spain was forced to renounce any and all claims to Cuba, and in the first article of the treaty signed December 10, 1898, between the two countries, commonly called the Treaty of Paris, Spain "relinquishes all claims of sovereignty over and title to Cuba." The island was taken in trust by the United States for the people of Cuba and was occupied by the armed forces of the United States until such time as reforms had been made, a constitution framed, and a government organized of a kind to justify the United States in withdrawing its army and transferring the government of the island to its people.

As this period was approaching, the Secretary of War, within whose jurisdiction the island lay, considered the terms upon which the transfer could be made and the conditions upon which the independence and prosperity of Cuba would depend in the future, as it seemed evident that Cuba might not be able to maintain its independence without a guarantee thereof on the part of the United States. Mr. Root considered, as stated in his instructions, dated February 9, 1901, to the Military Governor, that the government should be one "based upon the peaceful suffrages of the people of Cuba, representing the entire people and holding their power from the people, and subject to the limitations and safeguards which the experience of constitutional government has shown to be necessary to the preservation of individual rights." After stating the traditional policy of the United States that we "would not under any circumstances permit any foreign power other

than Spain to acquire possession of the island of Cuba," he then said that—

> The United States has, and always will have, the most vital interest in the preservation of the independence which she has secured for Cuba, and in preserving the people of that island from the domination and control of any foreign power whatever. The preservation of that independence by a country so small as Cuba—so incapable, as she must always be, to contend by force against the great powers of the world—must depend upon her strict performance of international obligations, upon her giving due protection to the lives and property of the citizens of all other countries within her borders, and upon her never contracting any public debt which in the hands of the citizens of foreign powers shall constitute an obligation she is unable to meet. The United States has, therefore, not merely a moral obligation arising from her destruction of Spanish authority in Cuba, and the obligations of the treaty of Paris for the establishment of a stable and adequate government in Cuba, but it has a substantial interest in the maintenance of such a government.
>
> We are placed in a position where, for our own protection, we have, by reason of expelling Spain from Cuba, become the guarantors of Cuban independence and the guarantors of a stable and orderly government protecting life and property in that island. Fortunately the condition which we deem essential for our own interests is the condition for which Cuba has been struggling, and which the duty we have assumed toward Cuba on Cuban grounds and for Cuban interests requires. It would be a most lame and impotent conclusion if, after all the expenditure of blood and treasure by the people of the United States for the freedom of Cuba and by the people of Cuba for the same object, we should, through the constitution of the new government, by inadvertence or otherwise, be placed in a worse condition in regard to our own vital interests than we were while Spain was in possession, and the people of Cuba should be deprived of that protection and aid from the United States which is necessary to the maintenance of their independence.

Mr. Root then proceeded to state the conditions essential to the establishment of law and order in Cuba, upon the acceptance of which the United States could properly base its guarantee of the independence of Cuban sovereignty. He said:

> The people of Cuba should desire to have incorporated in her fundamental law provisions in substance as follows:
>
> 1. That no government organized under the constitution shall be deemed to have authority to enter into any treaty or engagement with any foreign power which may tend to impair or interfere with the independence of Cuba, or to confer upon such foreign power any special right or privilege without the consent of the United States.
>
> 2. That no government organized under the constitution shall have authority to assume or contract any public debt in excess of the capacity of the ordinary revenues of the island after defraying the current expenses of government to pay the interest.
>
> 3. That upon the transfer of the control of Cuba to the government established under the new constitution Cuba consents that the United States reserve and retain the right of intervention for the preservation of Cuban independence and the main-

tenance of a stable government adequately protecting life, property, and individual liberty, and discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States and now assumed and undertaken by the government of Cuba.

4. That all acts of the military government, and all rights acquired thereunder, shall be valid and shall be maintained and protected.

5. That to facilitate the United States in the performance of such duties as may devolve upon her under the foregoing provisions, and for her own defense, the United States may acquire and hold the title to land for naval stations, and maintain the same at certain specified points.

The instructions of Secretary Root contemplated Congressional action, and the views expressed in them were incorporated in the following proviso, commonly known as the Platt Amendment to the Army Appropriation Act of March 2, 1901:

Provided further, That in fulfillment of the declaration in the joint resolution approved April twentieth, eighteen hundred and ninety-eight, entitled "For the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect," the President is hereby authorized to "leave the government and control of the island of Cuba to its people" so soon as a government shall have been established in said island under a constitution which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:

I

That the government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain, by colonization or for military or naval purposes or otherwise, lodgment in or control over any portion of said island.

II

That said government shall not assume or contract any public debt, to pay the interest upon which, and to make reasonable sinking-fund provision for the ultimate discharge of which the ordinary revenues of the island, after defraying the current expenses of government, shall be inadequate.

III

That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.

IV

That all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

V

That the government of Cuba will execute, and, as far as necessary, extend, the plans already devised or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the Southern ports of the United States and the people residing therein.

VI

That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

VII

That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States.

VIII

That by way of assurance the government of Cuba will embody the foregoing provisions in a permanent treaty with the United States.

A comparison of Mr. Root's instructions with the Platt Amendment shows that in substance as well as in form the instructions and the amendment are practically identical. As previously stated, the amendment was communicated to the constitutional convention and, in order to clear up any doubts or misunderstanding as to the interpretation of the third article both of the instructions and of the amendment, Secretary Root sent the following despatch, dated April 3, 1901, to General Wood, to be communicated to the constitutional convention, and which was actually communicated to a committee thereof:

You are authorized to state officially that in the view of the President the intervention described in the third clause of the Platt amendment is not synonymous with intermeddling or interference with the affairs of the Cuban government, but the formal action of the Government of the United States, based upon just and substantial grounds, for the preservation of Cuban independence, and the maintenance of a government adequate for the protection of life, property, and individual liberty, and adequate for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States.

This interpretation of the third article is of the utmost importance, as it shows the sense in which it was understood by the United States

and Cuba, disclaiming, as it does, "intermeddling or interference with the affairs of the Cuban government," and declaring the right of intervention to be "for the preservation of Cuban independence and the maintenance of a government adequate for the protection of life, property, and individual liberty." It is thus a guarantee of Cuban sovereignty, with the right of intervention to prevent action on the part of Cuban authorities, which, if permitted or continued, would jeopardize the independence which Cuba struggled so long and so manfully to obtain, and to secure which the United States intervened by force of arms in 1898.

As the amendment, as drafted and interpreted by Mr. Root, was accepted and incorporated in the constitution, and the constitution itself was promulgated by General Wood as Military Governor, on May 20, 1902, General Wood transferred the government in the following manner on May 20, 1902, to the President and Congress of the Republic of Cuba:

> Under the direction of the President of the United States, I now transfer to you as the duly elected representatives of the people of Cuba the government and control of the island, to be held and exercised by you, under the provisions of the constitution of the Republic of Cuba, heretofore adopted by the constitutional convention and this day promulgated; and I hereby declare the occupation of the island to be ended.
>
> This transfer of government and control is upon the express condition, and the Government of the United States will understand, that by the acceptance thereof you do now, pursuant to the provisions of the said constitution, assume and undertake all and several the obligations assumed by the United States with respect to Cuba by the treaty between the United States of America and Her Majesty the Queen Regent of Spain, signed at Paris on the 10th day of December, 1898.

On behalf of Cuba, President Palma replied:

> As President of the Republic of Cuba, I hereby receive the government of the island of Cuba which you transfer to me in compliance with orders communicated to you by the President of the United States, and take note that by this act the military occupation of Cuba ceases.
>
> Upon accepting this transfer I declare that the Government of the Republic assumes, as provided for in the constitution, each and every one of the obligations concerning Cuba imposed upon the United States by virtue of the treaty entered into on the 10th of December, 1898, between the United States and Her Majesty the Queen Regent of Spain.

It has been thought timely to state the origin and nature of the Platt Amendment in a brief but connected narrative, leaving to a subsequent comment the applicability of its essentials to the Latin American republics to the north of the Panama Canal.

THE REPEAL OF THE PROVISION OF THE PANAMA CANAL ACT EXEMPTING AMERICAN COASTWISE VESSELS FROM THE PAYMENT OF TOLLS

When the Act "to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone," the short title for which is "The Panama Canal Act," was passed by the Congress of the United States and approved by the President on August 24, 1912, an editorial appeared in the October number of the Journal for that year commenting upon the passage of the Act through Congress, and especially upon the provision that exempted American vessels engaged in the coastwise trade from the payment of tolls. Since that time this provision of the Act has been the subject of international controversy between the United States and Great Britain and an issue debated at great length and with much earnestness in the internal politics of the United States.

It is not necessary for our readers that we restate the positions of the two governments or recount the elaborate and at times heated arguments which have been elsewhere advanced on both sides of the question as to whether the provision referred to was in contravention of the Hay-Pauncefote Treaty. The substance of the first protest of Great Britain, dated July 8, 1912, which was filed with the Department of State while the Act was pending in Congress, and the text of the memorandum of President Taft which accompanied his signature of the Act by way of answer to the British protest, are contained in the editorial referred to.[1] The formal protest of Great Britain dated November 14, 1912, and handed to Secretary of State Knox by the British Ambassador on December 9, 1912, the answer of the United States, dated January 17, 1913, and the reply of Great Britain of February 27, 1913, are printed in full in the Supplement for 1913, pages 46, 208 and 100, respectively. The subject was put on the program of the Seventh Annual Meeting of the Society, held in Washington in April, 1913, and the printed Proceedings of that meeting contain the discussions in full on both sides of the question and upon all the points involved in the dispute.

The diplomatic correspondence had lagged for a little over a year when President Wilson, on March 5, 1914, took a decisive step toward ending the international problem which he had found unsolved upon his assumption of office a year previous. On this date he appeared before

[1] The text of the British note is printed in the Supplement for 1913, page 46.

Congress and made an address in which he expressed his personal opinion that discrimination in favor of American ships was prohibited by the treaty. But without urging this, his personal view, upon Congress, he earnestly requested for other reasons the repeal of the objectionable clause. The President's address is so very brief and concise that it is printed textually, as follows:

> Mr. Speaker, Mr. President, gentlemen of the Congress: I have come to you upon an errand which can be very briefly performed, but I beg that you will not measure its importance by the number of sentences in which I state it. No communication I have addressed to the Congress carried with it graver or more far-reaching implications as to the interest of the country, and I come now to speak upon a matter with regard to which I am charged in a peculiar degree, by the Constitution itself, with personal responsibility.
>
> I have come to ask you for the repeal of that provision of the Panama Canal Act of August 24, 1912, which exempts vessels engaged in the coastwise trade of the United States from payment of tolls, and to urge upon you the justice, the wisdom, and the large policy of such a repeal with the utmost earnestness of which I am capable.
>
> In my own judgment, very fully considered and maturely formed, that exemption constitutes a mistaken economic policy from every point of view, and is, moreover, in plain contravention of the treaty with Great Britain concerning the canal concluded on November 18, 1901. But I have not come to urge upon you my personal views. I have come to state to you a fact and a situation. Whatever may be our own difference of opinion concerning this much-debated measure, its meaning is not debated outside the United States. Everywhere else the language of the treaty is given but one interpretation, and that interpretation precludes the exemption I am asking you to repeal. We consented to the treaty; its language we accepted, if we did not originate; and we are too big, too powerful, too self-respecting a Nation to interpret with too strained or refined a reading the words of our own promises just because we have power enough to give us leave to read them as we please. The large thing to do is the only thing that we can afford to do, a voluntary withdrawal from a position everywhere questioned and misunderstood. We ought to reverse our action without raising the question whether we were right or wrong, and so once more deserve our reputation for generosity and for the redemption of every obligation without quibble or hesitation.
>
> I ask this of you in support of the foreign policy of the administration. I shall not know how to deal with other matters of even greater delicacy and nearer consequence if you do not grant it to me in ungrudging measure.

A bill to carry out the President's request was immediately introduced in the House of Representatives and promptly passed. In the Senate, however, it met a formidable and determined opposition, and was not passed until June 11th, after three months of debate, and then only with an amendment aimed to reserve any rights which the United States may

have under the treaty to discriminate in favor of its own vessels. The amendment was accepted by the House of Representatives on the following day and on June 15, 1914, the Act received the approval of the President of the United States and became a law. As finally passed, the Act, commonly known as the Repeal Bill, consists of only two sections, which read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second sentence in section five of the Act entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone," approved August twenty-fourth, nineteen hundred and twelve, which reads as follows: "No tolls shall be levied upon vessels engaged in the coastwise trade of the United States," be, and the same is hereby, repealed.

Sec. 2. That the third sentence of the third paragraph of said section of said Act be so amended as to read as follows: "When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November eighteenth, nineteen hundred and three:" Provided, That the passage of this Act shall not be construed or held as a waiver or relinquishment of any right the United States may have under the treaty with Great Britain, ratified the twenty-first of February, nineteen hundred and two, or the treaty with the Republic of Panama, ratified February twenty-sixth, nineteen hundred and four, or otherwise, to discriminate in favor of its vessels by exempting the vessels of the United States or its citizens from the payment of tolls for passage through said canal, or as in any way waiving, impairing, or affecting any right of the United States under said treaties, or otherwise, with respect to the sovereignty over or the ownership, control, and management of said canal and the regulation of the conditions or charges of traffic through the same.

The proviso inserted in the repeal bill in the Senate by way of amendment seems to be of doubtful effect. A reading of the President's message of March 5, 1914 plainly shows that he urged the repeal as an act of grace and generosity and that he had no desire or intention to raise the question as to whether the exemption was or was not a violation of the terms of the Hay-Pauncefote Treaty. Neither did he place his request upon the ground that it was made because of the insistence by Great Britain upon her interpretation of the treaty, for he distinctly stated that the action should be taken as a voluntary withdrawal by the United States from its position. If other evidence of the correctness of this statement of the President's attitude be needed in addition to his own statement of it in his address of March 5th, attention is called to a state-

ment reported to have been made in the House of Commons on June 29, 1914 by Sir Edward Grey, the British Foreign Secretary. In referring to an allegation that the action of President Wilson was the result of a diplomatic bargain with Great Britain, Sir Edward Grey is reported to have stated:

> It is due to the President of the United States and to ourselves that I should so far as possible clear away that misrepresentation. It was stated in some quarters that the settlement was the result of bargaining or diplomatic pressure. Since President Wilson came into office no correspondence has passed and it ought to be realized in the United States that any line President Wilson has taken was not because it was our line, but his own. President Wilson's attitude was not the result of any diplomatic communication since he has come into power, and it must have been the result of papers already published to all the world. It has not been done to please us or in the interests of good relations, but I believe from a much greater motive—the feeling that a government which is to use its influence among the nations to make relations better must never, when the occasion arises, flinch or quail from interpreting treaty rights in a strictly fair spirit.

A simple repeal of the exemption clause in the terms first enacted by the House of Representatives, in response to a request such as was made by the President, could not properly be interpreted as a waiver or relinquishment of any rights which the United States may have under the Hay-Pauncefote Treaty. Neither could the mere fact of the failure of the United States to exempt its vessels from the payment of tolls be regarded as a waiver or relinquishment of any such right to exempt. It will be recalled that the Panama Canal Act as originally reported to the House of Representatives in 1912 made no provision for the exemption of American vessels, and, as pointed out in these columns at that time, the House Committee in reporting the bill so drawn made a distinct declaration that the wording of the bill was not based upon nor did it refer to any interpretation or construction of the treaty. The Committee used the following forcible language:

> While many members of our committee believe that by the terms of our treaties with Great Britain we are prevented from allowing preferential or free tolls to ships of American registry, either coastwise or foreign, the majority of the committee voting for uniform tolls authorize and request the statement—positive, plain, and unequivocal—that no language of this section was chosen or used for the purpose of foreclosing discussion and differing opinions on that question. They authorize the express affirmation that this provision is adopted for present use, disclaiming all intention to declare in this section any construction of the language of the treaty or to establish any precedent or permanent legislative policy or to bind any future Congress should it be deemed expedient or adjudged competent to adopt a different basis.

The insertion of the proviso seems to have been made primarily as a political expedient for obtaining the support of those Senators who did not believe that the law as adopted in 1912 was a violation of the treaty but who opposed the exemption on the ground that it was an unsound economic policy of the government. The adoption of this amendment serves to indicate the substantial doubt in the minds of a great many, if not a probable majority, of the Senators that the exemption of American coastwise vessels from the payment of tolls may not properly be granted by the United States without running counter to the letter and spirit of the treaty. The approval of this amendment by the President after he had asked for repeal without raising the question of treaty interpretation, shows the narrow margin on which he had to rely in getting the bill through the Senate.

The adoption of the proviso seems also to serve notice that the question has been only temporarily postponed and that it may be raised again should another Congress see fit to pursue the policy pursued by the Congress in 1912 of using the Canal as a means of aiding the American merchant marine. Such a contingency will no doubt depend in large measure upon the amount of revenue which the Canal actually produces and the size of the annual bills for maintaining and operating it. Should there be any considerable deficit it is not likely that any future Congress will vote to increase the deficit by relieving the American vessels of their share of the burden. On the other hand, should there be a surplus the question of relieving American vessels from the payment of tolls in this waterway as in all other waterways of the United States may again be raised.

There can be no doubt that the best solution of the question would have been its arbitration at the present time, just as there can be no doubt that if the question is raised again it will have to be submitted to arbitration. It is a purely legal question, involving the interpretation of a treaty, a class of questions universally recognized as being proper subjects for international arbitration and mentioned especially in all arbitration agreements, including the general arbitration treaty of 1908 between the United States and Great Britain, recently renewed for another period of five years.

Arbitration at the present time would have been entirely satisfactory to Great Britain. Her last diplomatic communication on the subject was practically limited to a request for arbitration. Arbitration was also desired by a majority in the Congress of the United States, but in

order to bring about an arbitration in the United States a treaty negotiated by and with the consent of the Senate is necessary, and a majority of the Senate is not sufficient to consent to a treaty. The assent of two-thirds of the Senators is necessary before a treaty may be ratified by the President of the United States, and it was evident, not only before the repeal was requested by the President, but also after it was practically assured that the bill would be passed, that the consent of two-thirds of the Senators could not be obtained to submit the tolls question to arbitration.

THE EIGHTH ANNUAL MEETING OF THE SOCIETY

The Eighth Annual Meeting of the American Society of International Law was held, according to previous announcement, in Washington at the New Willard Hotel from April 22 to April 25, 1914. The general subject selected by the committee for consideration at the meeting was the Monroe Doctrine. The committee also placed upon the program the subject of the teaching of international law in American institutions of learning, as explained in an editorial comment of the Journal for January last. The codification of international law, which had been included in the program as a third subject for consideration, in anticipation of a report from the Committee on Codification, was not taken up at the meeting because the Committee found it impracticable to render a report at the present time and requested that the committee be continued which request was granted by the Society.

It was considered desirable and convenient to treat the two general subjects to be considered by the meeting separately by dividing the sessions between them and the program was arranged accordingly.

In pursuance of this plan the meeting was opened on Wednesday evening, April 22, 1914, at eight o'clock, by the Honorable Elihu Root, President of the Society, who took as the subject for his presidential address "The Real Monroe Doctrine." He was followed by Mr. Charles Francis Adams, of Boston, who described the origin of the doctrine. The subject was resumed at the session beginning at 2:30 o'clock on the afternoon of Thursday, April 23rd, by a consideration of the statements, interpretations and applications of the Monroe Doctrine and of more or less allied doctrines during three different periods of its history. The period from 1823–1845 was covered by Mr. William R. Manning, Adjunct Professor of Spanish American History in the University of

Texas; from 1845–1870 by Mr. James M. Callahan, Professor and Head of the Department of History and Political Science of the University of West Virginia; from 1870 to the present time by Mr. John H. Latané, Professor and Head of the Department of History in Johns Hopkins University. The subject was continued at the evening session of the same day, at which three papers dealing with the misconceptions and limitations of the Monroe Doctrine were read,—one by the Honorable John W. Foster, formerly Secretary of State of the United States, and Chairman of the Executive Committee of the Society; another by Mr. Leo S. Rowe, Professor of Political Science in the University of Pennsylvania, and the third by Mr. Eugene Wambaugh, Professor of International Law in Harvard Law School. At ten o'clock on the following morning Friday, April 24th, Professor William I. Hull, of Swarthmore College, spoke on a special topic "The Monroe Doctrine: National or International?" He was followed by Mr. Joseph Wheless, of St. Louis, Missouri, who pointed out what countries benefit by the doctrine. Professor Hiram Bingham, of Yale University, then gave the Latin-American attitude toward the doctrine. The final session devoted to this subject was held at eight o'clock Friday evening, April 24th. Two papers were read at this meeting, one by the Honorable Charlemagne Tower, formerly American Ambassador to Austria-Hungary, Russia and Germany, entitled "The European attitude toward the Monroe Doctrine," and the other by Professor George H. Blakeslee, of Clark University, who compared the Monroe Doctrine of 1823 with the doctrine of the present day and discussed the question whether the doctrine should continue to be a policy of the United States. The Honorable Charles B. Elliott, who was scheduled to speak on the same subject, was unable on account of illness to be present.

The consideration of the subject of the teaching of International Law was assigned to a conference of teachers of international law, invitations to participate in which were sent out by the President of the Society to leading educational institutions in the United States. Forty-one colleges and universities accepted the invitation and sent representatives to take part in the conference as follows:

Boston University, James F. Colby; Brown University, James C. Dunning; University of California, Orrin K. McMurray; University of Chicago, Ernst Freund; Clark College, George H. Blakeslee; Cornell University, Samuel P. Orth; Dartmouth College, James F. Colby, Frank A. Updyke; Dickinson College, Eugene A. Noble; George Washington

University, Charles Noble Gregory, C. H. Stockton; University of Georgia, H. A. Nix; Hamilton College, Frank H. Wood; Harvard University, Eugene Wambaugh, George G. Wilson; University of Illinois, James W. Garner; Johns Hopkins University, James Brown Scott; University of Kansas, F. H. Hodder; Lafayette College, E. D. Warfield; Lehigh University, John L. Stewart; Louisiana State University, Arthur T. Prescott; University of Michigan, Jesse S. Reeves; University of Minnesota, William A. Schaper; University of Missouri, John D. Lawson; University of Nebraska, Edwin Maxey; College of the City of New York, Walter E. Clark; New York University, F. W. Aymar; Northwestern University, Charles Cheney Hyde; University of Notre Dame, William Hoynes; Oberlin College, Karl F. Geiser; University of Pennsylvania, Leo S. Rowe; University of Pittsburgh, Francis N. Thorpe; Princeton University, Philip Brown; Swarthmore College, William I. Hull; Syracuse University, Earl E. Sperry; University of Texas, William R. Manning; Tufts College, Arthur I. Andrews; Union College, Charles J. Herrick; University of Virginia, Raleigh C. Minor; Washington University, Edward C. Eliot; Western Reserve University, Francis W. Dickey; University of West Virginia, James M. Callahan; University of Wisconsin, Stanley K. Hornbeck; Yale University, Gordon E. Sherman.

The conference was opened by the Honorable Elihu Root on Thursday morning, April 23, 1914, at ten o'clock, with a short but very important address in which he showed his great interest in the subject. At the close of this session His Excellency Mr. da Gama, the Ambassador from Brazil, also addressed the delegates. The following points were placed before the conference for consideration and recommendations:

1. Plans for increasing the facilities for the study of international law; for placing the instruction on a more uniform and scientific basis; and for drawing the line between undergraduate and graduate instruction.

2. The question of requiring a knowledge of the elements of international law for candidates for advanced degrees.

3. The advisability of urging all institutions with graduate courses in law to add a course in international law where not already given.

4. The advisability of calling the attention of the State bar examiners to the importance of requiring some knowledge of the elements of international law in examinations for admission to the bar.

5. The advisability of requesting the American Bar Association, through its appropriate committee, to consider the question of including the study of international law in its recommendations for a deeper and wider training for admission to the bar.

6. The desirability and feasibility of plans for securing the services of professors

of or lecturers on international law to whom can be assigned definite lecture periods in institutions where international law is not now taught or is inadequately taught—the services to rotate between institutions where they will be acceptable.

7. The advisability of requesting universities which now have summer schools to include among the subjects offered courses on the elements of international law, and, if there be occasion for it, to offer advanced courses of interest and profit for advanced students and instructors.

Each of the foregoing questions was referred to a separate committee, upon which the delegates were appointed according to their expressed preferences. The seven committees were composed as follows:

COMMITTEE No. 1.—William I. Hull, *Chairman*, Walter E. Clark, Karl F. Geiser, Charles Cheney Hyde, Raleigh C. Minor, Jesse S. Reeves, Leo S. Rowe, William A. Schaper, Gordon E. Sherman, Frank H. Wood.

COMMITTEE No. 2.—George H. Blakeslee, *Chairman*, James W. Garner, Stanley K. Hornbeck.

COMMITTEE No. 3.—James F. Colby, *Chairman*, F. H. Hodder, William Hoynes.

COMMITTEE No. 4.—John D. Lawson, *Chairman*, Charles J. Herrick, Edwin Maxey, H. A. Nix, Samuel P. Orth.

COMMITTEE No. 5.—Edward C. Eliot, *Chairman*, Francis N. Thorpe, Eugene Wambaugh.

COMMITTEE No. 6.—Philip Brown, *Chairman*, Arthur I. Andrews, James M. Callahan, Francis W. Dickey, Arthur T. Prescott, E. D. Warfield.

COMMITTEE No. 7.—William R. Manning, *Chairman*, F. W. Aymar.

The committees held a number of sessions and reported their recommendations to the full conference on Friday afternoon, April 24th, and Saturday morning, April 25th. The recommendations were discussed and considered in detail by the entire conference and adopted by it, either as reported by the committees or with modifications or amendments. The resolutions finally presented and adopted read as follows:

RESOLUTION No. 1

Resolved, That the Conference of Teachers of International Law and Related Subjects hereby recommends to the American Society of International Law the appointment of a Standing Committee of the Society on the Study and Teaching of International Law and Related Subjects, upon lines suggested by the recommendations of the Conference.

RESOLUTION No. 2

Resolved, That, in order to increase the facilities for the study of international law,

the Conference hereby recommends that the following steps be taken to improve and enlarge library and reference facilities.

(a) That a carefully prepared bibliography of international law and related subjects be published, with the names of publishers and prices so far as these may be obtainable, with especial reference to the needs of poorly endowed libraries.

(b) That there be published likewise a carefully prepared index or digest of the various heads and sub-heads in international law, with references to all standard sources of authority upon each head.

(c) That there be published in a cheap and convenient form all documents of state, both foreign and domestic, especially Latin American, bearing upon international law, including treaties, documents relating to arbitration, announcements of state policy, and diplomatic correspondence, and that the aid of the Department of State be solicited in securing copies of such documents for publication.

(d) That at short intervals a bulletin be published, containing excerpts from the Congressional Record and other current sources, giving reliable information upon international questions arising from time to time and the final disposition of such questions.

(e) That a law reporter of international cases be issued.

Resolution No. 3

Resolved, That, in order further to increase the facilities for the study of international law, the Conference recommends that steps be taken to extend the study of that subject by increasing the number of schools at which courses in international law are given, by increasing the number of students in attendance upon the courses, and by diffusing a knowledge of its principles in the community at large, and, more particularly:

(a) That, as the idea of direct government by the people grows, it becomes increasingly essential to the well-being of the world that the leaders of opinion in each community be familiar with the rights and obligations of states, with respect to one another, as recognized in international law. Hence, it has become a patriotic duty, resting upon our educational institutions, to give as thorough and as extensive courses as possible in this subject.

(b) That a course in international law, where possible, should consist of systematic instruction extending over at least a full academic year, divided between international law and diplomacy.

(c) That prominent experts in international law be invited from time to time to lecture upon the subject at the several institutions.

Resolution No. 4

Resolved, That, with a view of placing instruction in international law upon a more uniform and scientific basis, the Conference makes the following recommendations:

(a) In the teaching of international law emphasis should be laid on the positive nature of the subject and the definiteness of the rules.

Whether we regard the teaching of value as a disciplinary subject or from the standpoint of its importance in giving to the student a grasp of the rules that govern the relations between nations, it is important that he have impressed upon his mind the definiteness and positive character of the rules of international law. The teaching

of international law should not be made the occasion for a universal peace propaganda. The interest of students and their enthusiasm for the subject can best be aroused by impressing upon them the evolutionary character of the rules of international law. Through such a presentation of the subject the student will not fail to see how the development of positive rules of law governing the relations between states has contributed towards the maintenance of peace.

(b) In order to emphasize the positive character of international law, the widest possible use should be made of cases and concrete facts in international experience.

The interest of students can best be aroused when they are convinced that they are dealing with the concrete facts of international experience. The marshalling of such facts in such a way as to develop or illustrate general principles lends a dignity to the subject which can not help but have a stimulating influence.

Hence, international law should be constantly illustrated from those sources which are recognized as ultimate authority, such as: (a) cases, both of judicial and arbitral determination; (b) treaties, protocols, acts, and declarations of epoch-making congresses, such as Westphalia (1648), Vienna (1815), Paris (1856), The Hague (1899 and 1907), and London (1909); (c) diplomatic incidents ranking as precedents for action of an international character; (d) the great classics of international law.

(c) In the teaching of international law care should be exercised to distinguish the accepted rules of international law from questions of international policy.

This is particularly true of the teaching of international law in American institutions. There is a tendency to treat as rules of international law certain principles of American foreign policy. It is important that the line of division be clearly appreciated by the student. Courses in the foreign policy of the United States should therefore be distinctly separated from the courses in international law, and the principles of American foreign policy, when discussed in courses of international law, should always be tested by the rules which have received acceptance amongst civilized nations.

(d) In a general course on international law the experience of no one country should be allowed to assume a consequence out of proportion to the strictly international principles it may illustrate.

Resolution No. 5

Resolved, That the Conference recommends that a major in international law in a university course leading to the degree of doctor of philosophy be followed, if possible, by residence at The Hague and attendance upon the Academy of International Law which is to be established in that city; that it is the sense of the Conference that no better means could possibly be devised for affording a just appreciation of the diverse national views of the system of international law or for developing that "international mind" which is so essential in a teacher of that subject: and that therefore as many fellowships as possible should be established in the Academy at The Hague, especially for the benefit of American teachers and practitioners of international law.

Resolution No. 6

Resolved, That it is the conviction of this Conference that the present development of higher education in the United States and the place which the United States has now assumed in the affairs of the Society of Nations justify and demand that the

study of the science and historic applications of international law take its place on a plane of equality with other subjects in the curriculum of colleges and universities and that professorships or departments devoted to its study should be established in every institution of higher learning.

RESOLUTION No. 7

Resolved, That, in order adequately to draw the line between undergraduate and graduate instruction in international law, the Conference makes the following recommendations:

Assuming that the undergraduate curriculum includes a course in international law, as recommended in Resolution No. 6, the Conference suggests that graduate instruction in international law concerns three groups of students:

(a) Graduate students in law;

(b) Graduate students in international law and political science;

(c) Graduate students whose major subjects for an advanced degree are in other fields, for example, history or economics.

The first two groups of students have a professional interest in international law, many having in view the teaching of the subject, its practice, or the public service. Therefore, as to them, the Conference recommends that the graduate work offered be distinctively of original and research character, somewhat as outlined in Resolution No. 4, following a preliminary training in the fundamental principles of the subject, as pursued in the undergraduate course or courses.

As to those of the third group, having less professional interest in international law, a broad general course in the subject is recommended.

RESOLUTION No. 8

Resolved, That this Conference directs that a letter be sent to teachers of political science, law, history, political economy and sociology throughout the country calling attention to and emphasizing the essential and fundamental importance of a knowledge of international law on the part of students in those branches, which letter shall state the opinion of this Conference that every college of liberal arts, every graduate school and every law school, should have or make provision for courses in international law and urge that all graduate students working in the above mentioned fields be advised to include this subject in their courses of study.

Resolved, That, in accordance with the preceding resolution, there be prepared and sent out with this letter reprints of Senator Root's article entitled "The need of popular understanding of international law," which appeared in Vol. 1 of the American Journal of International Law, and of his address delivered at the opening of this Conference.

Resolved, That the Recording Secretary of the American Society of International Law attend to the drafting, printing and distribution of the above specified letter and reprints and that he is hereby authorized, if he sees fit, to send out additional literature therewith.

RESOLUTION No. 9

Resolved, That, in recognition of the growing importance of a knowledge of international law to all persons who plan to devote themselves to the administration of

justice, and who, through their professional occupation, may contribute largely to the formation of public opinion and who often will be vested with the highest offices in the State and nation, this Conference earnestly requests all law schools which now offer no instruction in international law to add to their curriculum a thorough course in that subject.

Resolved further, That a copy of this resolution be sent to all law schools in the United States.

Resolution No. 10

Resolved, That the Conference hereby calls the attention of the State bar examiners and of the bodies whose duty it is to prescribe the subjects of examination, to the importance of requiring some knowledge of the elements of international law in examinations for admission to the bar, and urges them to make international law one of the prescribed subjects.

Resolution No. 11

Resolved, That the Conference hereby requests the American Bar Association to take appropriate action toward including international law among the subjects taught in law schools and required for admission to the bar.

Resolution No. 12

Resolved, That the Conference hereby adopts the following recommendations:

(a) That it is desirable, upon the initiative of institutions where instruction in international law is lacking, to take steps toward providing such instruction by visiting professors or lecturers, this instruction to be given in courses, and not in single lectures, upon substantive principles, not upon popular questions of momentary interest, and in a scientific spirit, not in the interest of any propaganda.

(b) That members of the American Society of International Law, qualified by professional training, be invited by the Executive Council or the Executive Committee of the Society to give such courses, and that provision be made, through the establishment of lectureships or otherwise, to bear the necessary expenses of the undertaking;

(c) That the Standing Committee on the Study and Teaching of International Law and Related Subjects of the American Society of International Law, the appointment of which was recommended in Resolution No. 1, be requested to ascertain what institutions are in need of additional instruction in international law and endeavor to find means of affording such assistance as may be necessary to the teaching staff of the said institutions or of supplying this additional instruction by lecturers chosen by the said Committee and approved by the Executive Council or Executive Committee.

(d) That steps be taken to bring to the attention of every college at present not offering instruction in international law the importance of this subject and the readiness of the American Society of International Law, through its Standing Committee on the Study and Teaching of International Law and Related Subjects, to coöpérate with such institutions in introducing or stimulating instruction.

RESOLUTION No. 13

Resolved, That this Conference hereby requests and recommends that universities having summer schools offer summer courses in international law.

Resolved further, That the American Society of International Law, through its Standing Committee on the Study and Teaching of International Law and Related Subjects, is hereby requested to endeavor to stimulate a demand for courses in international law in summer schools.

RESOLUTION No. 14

Resolved, That the Conference recommends the establishment and encouragement in collegiate institutions of specialized courses in preparation for the diplomatic and consular services.

RESOLUTION No. 15

Resolved, That the Conference recommends that the study of international law be required in specialized courses in preparation for business.

RESOLUTION No. 16

Resolved, That a Committee of Revision, consisting of ten members, of which Mr. James Brown Scott shall be chairman *ex officio*, be appointed by the Chair for the revision in matters of form of the various resolutions and recommendations made to this Conference by the different committees and subcommittees and adopted by it, the said Committee of Revision to send a copy of the said resolutions and recommendations to every law school, college and university in the United States and to the American Society of International Law, through its Executive Council or Executive Committee, for such action as will serve to effectuate the recommendations of the Conference.

The following members were, in accordance with Resolution No. 16, appointed on the Committee of Revision, which prepared the resolutions in the form above given: Robert Bacon, George H. Blakeslee, Philip Brown, James F. Colby, Edward C. Eliot, John W. Foster, William I. Hull, John D. Lawson, William R. Manning, Elihu Root.

Space will not permit at this time of any comment upon the significance and importance of the action taken by the conference. The bare facts have been recorded for the readers of the Journal, who will be informed through these columns of subsequent lines of action which may be developed from this conference, which may turn out to be an epoch-making step in fostering the study and teaching of international law.

The business meeting of the Society was held on Saturday morning, April 25th, immediately after the adjournment of the conference of teachers of international law. The following officers were elected for the ensuing year:

President

HON. ELIHU ROOT

Vice-Presidents

CHIEF JUSTICE WHITE
JUSTICE WILLIAM R. DAY
HON. P. C. KNOX
MR. ANDREW CARNEGIE
HON. JOSEPH H. CHOATE
HON. JOHN W. FOSTER
HON. GEORGE GRAY
HON. WILLIAM W. MORROW
HON. RICHARD OLNEY
HON. HORACE PORTER
HON. OSCAR S. STRAUS
HON. JACOB M. DICKINSON
HON. JAMES B. ANGELL
HON. WILLIAM H. TAFT
HON. WILLIAM J. BRYAN

Members of the Executive Council to serve until 1917

HON. RICHARD BARTHOLDT, Missouri
PROF. CHARLES NOBLE GREGORY, District of Columbia
REAR ADMIRAL CHARLES H. STOCKTON, District of Columbia
HON. JOHN SHARP WILLIAMS, Mississippi
GEN. GEORGE B. DAVIS, District of Columbia
HON. A. J. MONTAGUE, Virginia
CHARLES B. WARREN, ESQ., Michigan
PROF. THEODORE S. WOOLSEY, Connecticut

Member of the Executive Council to serve until 1916, in place of the late Senator Bacon

HON. HENRY CABOT LODGE, Massachusetts

As an honorary member of the Society, the standing committee recommended, and the Society elected, Signor Pasquale Fiore, Senator of Italy, member of its Council on Diplomatic Affairs, member of the Institute of International Law, Professor of International Law in the University of Naples.

At the meeting of the Executive Council, which took place immediately upon the adjournment of the Society, the following additional officers and committees were chosen:

Chairman of the Executive Council, HON. JOHN W. FOSTER

Executive Committee

HON. ELIHU ROOT
HON. GEORGE GRAY
JACKSON H. RALSTON, ESQ.
HON. ROBERT LANSING
HON. JOHN BASSETT MOORE
PROF. GEORGE G. WILSON
HON. OSCAR S. STRAUS

Ex-Officio

HON. JOHN W. FOSTER, Chairman
JAMES BROWN SCOTT, ESQ., Recording Secretary
CHARLES HENRY BUTLER, ESQ., Corresponding Secretary
HON. CHANDLER P. ANDERSON, Treasurer

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GEORGE G. WILSON
THEODORE S. WOOLSEY

GEORGE A. FINCH, Secretary of the Board of Editors and Business Manager of the Journal

Committees

Standing Committee on Selection of Honorary Members: George G. Wilson, Chairman; Jackson H. Ralston, Theodore S. Woolsey.

Standing Committee on Increase of Membership: James Brown Scott, Chairman; Charles Cheney Hyde, John H. Latané, Jesse S. Reeves, Theodore S. Woolsey.

Auditing Committee: Clement L. Bouvé, Jackson H. Ralston.

Committee on Codification: Elihu Root, Chairman, ex-officio; Chandler P. Anderson, Charles Henry Butler, Lawrence B. Evans, Charles Noble Gregory, Robert Lansing, Paul S. Reinsch, Leo S. Rowe, James Brown Scott, George G. Wilson.

Committee on Publication of Proceedings: George A. Finch, Otis T. Cartwright.

Committee on Ninth Annual Meeting: James Brown Scott, Chairman; Philip Brown, James W. Garner, Robert Lansing, Walter S. Penfield, Jackson H. Ralston, Eugene Wambaugh.

The annual meeting closed as usual with a banquet on Saturday evening, April 25th. Mr. Root presided as toastmaster and the other speakers of the evening were the honorable William Jennings Bryan, Secretary of State, the Honorable F. C. Stevens, Member of Congress from Minnesota, and Mr. Archibald C. Coolidge, recently exchange professor in Germany of Harvard University. While the members of the Society who attended the banquet expectantly awaited the remarks of the Secretary of State, in view of the critical state of the relations between the United States and Mexico, growing out of the occupation of Vera Cruz a few days previously by the naval forces of the United States, he took them completely by surprise by announcing and incorporating in his remarks the text of the exchange of notes, completed just before he entered the banquet hall, between the United States and the representatives of Argentina, Brazil and Chile, offering and accepting the mediation of the three latter countries in an endeavor to prevent further armed conflict between the United States and Mexico.

The plan adopted this year of dividing the meeting between sessions devoted exclusively to professional and scientific discussions and others devoted to the presentation of the subjects in a way to appeal to a more popular audience seems to have worked exceptionally well, as the meetings were better attended than any since the Society's existence. The plan is likely to be followed and perhaps improved upon for the future meetings of the Society.

THE LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION

The twentieth annual meeting of the Lake Mohonk Conference on International Arbitration was held in the last week of May and, as usual, was attended by a large and influential body of men and women interested in the peaceful settlement of international disputes and the means by which such settlement may be advanced. The conference had the great advantage of having as chairman, Mr. John Bassett Moore, late counselor for the Department of State, and in a careful, thoughtful and valuable address he showed that our government had repeatedly submitted disputes to arbitration, which would be excluded

by the restrictive treaties either in force or in contemplation. The line of advance, therefore, in this case, as in so many instances, is through the past rather than by a slavish adherence to present doubts and scruples as to the efficacy of a method which has justified itself so abundantly in the last hundred years and more.

In view of the approaching Hague Conference, it was but natural that this subject should figure prominently on the program and in the discussion, and the views expressed both in the formal papers and in the discussions on the floor were both progressive and constructive. It is but natural that there should be an element of sameness in the papers on a subject which for twenty years has engaged the attention of the conference, and that the views, however well expressed, should be restatements of positions formerly taken. This criticism, if it be a criticism, would apply to the platform, which aims to embody in terse form the views of the members considered as a body. But even if this be so, it does not militate in the slightest against the usefulness of the conference, because it has stood for peaceable settlement, primarily through arbitration, for the past twenty years. It has convinced opponents, who, in the language of Goldsmith, went to scoff, yet remained to pray. In the course of its existence, thousands of people who have attended have been strengthened in their views and have become centers of propaganda throughout the country. It has thus been an educational force and has come to be recognized as such, not only here, but abroad, as is evidenced by the frequency and respect with which its proceedings are quoted by foreign publicists. The movement created by Albert K. Smiley and his friends, and carried on by Daniel Smiley, a devoted and worthy successor, has thus become in no uncertain sense and in no small measure international.

In view of these facts and of the great influence which the conference justly has and wisely uses, it seems the part of wisdom to many of its friends that, without discarding arbitration, it should nevertheless broaden its scope and include a discussion of other agencies calculated to carry on and to perfect the work of arbitration. Reference is made to judicial settlement as such. There is a great difference of opinion as to whether arbitration will continue in the future as in the past, or whether it should develop into or give way to judicial procedure as such. Many well informed people, both in this country and abroad, maintain that arbitral adjustment is synonymous with judicial decision and, if such really be the case, it is clear that there is no room for judicial decision

as a separate and distinct remedy. It would seem, however, in this case, that there could be no objection on the part of advocates of arbitration to the creation of a permanent court of justice to decide according to judicial methods any and all controversies of a kind which have previously been arbitrated. If, on the other hand, arbitration differs from judicial decision, the question may well arise as to which is the better method. This, however, is not necessarily involved, because the partisans of judicial settlement as distinct from arbitration recognize the usefulness of the latter method and seek to establish an international court of justice for what they term the judicial decision of disputes between nations, without in any way affecting arbitration or the Permanent Court of Arbitration created by the First Hague Conference and improved by the Second. The question is not one to be settled by an array of distinguished names, which may be cited in favor of arbitration or of judicial procedure. The issue goes to the nature of the two remedies and the results flowing from the application of the principles controlling each. It is, however, safe to assume that the deliberate opinion of a man of Mr. Root's standing and experience should not be lightly disregarded, and it is common knowledge that he believes the future of arbitration—meaning thereby peaceful settlement between nations—depends upon its conversion into a truly judicial proceeding.

In an address delivered before the American Society for Judicial Settlement of International Disputes, Mr. Root said that "the difficulty that stands in the way of arbitration today is an unwillingness on the part of the civilized nations of the earth to submit their disputes to impartial decision. I think," he said, "the difficulty is a doubt on the part of civilized nations as to getting an impartial decision. And that doubt arises from some characteristics of arbitral tribunals, which are very difficult to avoid." After considering these difficulties, he then said:

> Now it has seemed to me very clear that in view of these practical difficulties standing in the way of our present system of arbitration, the next step by which the system of peaceable settlement of international disputes can be advanced, the pathway along which it can be pressed forward to universal acceptance and use, is to substitute for the kind of arbitration we have now, in which the arbitrators proceed according to their ideas of diplomatic obligation, real courts where judges, acting under the sanctity of the judicial oath, pass upon the rights of countries, as judges pass upon the rights of individuals, in accordance with the facts as found and the law as established. With such tribunals, which are continuous, and composed of judges who make it their life business, you will soon develop a bench composed of men who have become familiar with the ways in which the people of every country do their

business and do their thinking, and you will have a gradual growth of definite rules, of fixed interpretation, and of established precedents, according to which you may know your case will be decided.[1]

Certainly the opinion of one who as Secretary of State negotiated more treaties of arbitration than any American statesman and who appeared as leading counsel of the United States before a great arbitral tribunal, is entitled to no ordinary degree of respect and, instead of indiscriminate praise of arbitration and a denial of the differences between it and judicial settlement, the essentials of the two methods should be examined, in order to see whether a difference exists and whether, as Mr. Root says, "the next step * * * is to substitute for the kind of arbitration we have now * * * real courts where judges * * * pass upon the rights of countries * * * in accordance with the facts as found and the law as established."

It is believed that the Mohonk Conference could consider whether judicial settlement is the next step and, if so, how this next step could properly be taken. There is no finality in the domain of politics. A remedy which has served its term is cast aside for a better, just as the theory of natural law, which rendered inestimable services in the creation and development of international law, has been cast aside as a fiction. The conservative has his place, but however he may conserve the past, he does not make or mold the future.

Without, however, dwelling upon this question, about which, as has been said, there is much difference of opinion, the platform of the Mohonk Conference is quoted in full, and attention is called especially to the recommendation of an international court of justice, as recommended by the Second Hague Conference:

The Twentieth Annual Lake Mohonk Conference on International Arbitration while deploring the fact that the history of the past year has been disfigured by wars in both hemispheres, attended at times by shocking barbarities, recognizes unmistakable signs of the advance of the public opinion of the world towards the peaceful settlement of international disputes. The general peace of Europe has been maintained in spite of the grave situation in the Balkans; and in the face of threatened war, the American people have shown a praiseworthy self-restraint, and have accepted with commendable spirit the tender of good offices made in accordance with the recommendations of the First Hague Conference, by our sister republics of South America—Brazil, Argentina and Chile.

[1] Proceedings of American Society for Judicial Settlement of International Disputes (1910), pp. 11–13.

We recognize the far-reaching importance of the proffer and acceptance of mediation, and record our confidence that the work of the conference of mediators, now in session, will result in an honorable and permanent settlement of the points at issue between the United States and Mexico. We express unqualified endorsement of President Wilson's declaration that this country does not aim at territorial aggrandizement.

We call renewed attention to the necessity of such legislation as shall place all matters involving our relations to aliens and to foreign nations under the direct and effectual control of the federal government and the jurisdiction of the federal courts. Foreign governments can deal only with our national government; and the respective responsibilities of the states and of the nation should promptly be so readjusted as to terminate the anomalous conditions under which our friendly relations with other powers have repeatedly in recent years been menaced.

We urge such action by our government as shall secure the convoking of the Third Hague Conference at the earliest practicable date, with such thorough preparation of its program as shall ensure for the Conference the highest measure of success. We recall with satisfaction the initiative of our government in calling the Second Hague Conference and in securing provision in its convention for the assembling of the Third Conference. We express our satisfaction that steps have already been taken by our Government to facilitate the calling of the Third Conference. We urge upon our people and upon all peoples the importance of convening the Conferences at regular intervals.

We recommend that in addition to the present Permanent Court of Arbitration at The Hague, as established under the conventions of 1899 and 1907, there be established as soon as practicable, among such powers as may agree thereto, a court with a determinate personnel, as advised by the Second Hague Conference.

We gratefully recognize in the establishment since the last Mohonk Conference of the Church Peace Union, in the large development of the British and German Peace Councils, and in the recent solemn appeal of the churches of Switzerland to the churches of Europe for united effort in behalf of the cause of peace an impressive witness of the drawing together of the world's religious forces for the strengthening of international justice and co-operation; and we bespeak for the coming International Church Conference in Switzerland the earnest support of the American churches.

We express anew our deep interest in the proposed celebration of the centenary of peace between the United States and Great Britain, to be inaugurated on Christmas Eve, 1914, the anniversary of the signing of the Treaty of Ghent. We commend to the world the impressive example of the unfortified Canadian boundary line of 4000 miles. We rejoice that the plans for the proposed celebration include the official participation of many nations, and urge the co-operation of all friends of peace in this commemoration of the triumphs of a marvelous century of international good will and of progress toward international justice and righteousness.

Resolution

In view of the powerful influence exercised by the press, be it resolved that it is the sense of the Lake Mohonk Conference on International Arbitration that the

cause for which we are striving would be aided and encouraged through the convening of a congress of editors in Washington, D. C., for the discussion of international arbitration and for the awakening of the public conscience to the advantages of a peaceful settlement of differences arising between nations.

THE BARONESS BERTHA VON SUTTNER (1843–1914)

It is essential to the success of any reform that it be presented to the public in such a way as to gain and hold its attention. A small knot of reformers may convert their immediate friends and create a sentiment in favor of their projects, and this sentiment may suffice if the reform in question concern but a section of the community and can be carried into effect by the legislature, if it require a statute, provided that the reform does not meet with the opposition of large and interested sections of the particular community.

Thus John Howard started prison reform, and he and his followers only needed to overcome the indifference of the authorities and the public. Again, Sir Samuel Romilly started a movement in favor of the reform of the criminal law of England. This was preëminently a legislative question. Members of Parliament were apathetic; and, curiously enough, the judges, such as Lords Eldon and Ellenborough, set their faces against every attempt to lessen the number of capital offenses. But however unsuccessful he was in Parliament, his efforts attracted the attention of the public, and the great body of Englishmen became convinced of the essential barbarity of their criminal code. The efforts of Romilly's associate and successor in the good work, Sir James Mackintosh, were seconded by public opinion, which made itself felt even in an unreformed Parliament, where Sir Robert Peel, on behalf of a Tory Government and in the teeth of the old opponents, declared himself in his great speech of March 9, 1826, in favor of the reform of the code and, as Home Secretary, carried it out.

Let us take, however, an example of a larger movement carried to success which required and received the support of the public at large. The movement for the abolition of slavery in the United States was started by a few obscure reformers whose names are, however, treasured today by a grateful and regenerated people. Their appeal was largely to the conscience; it did not and could not touch or stir the heart. In 1852, one Harriet Beecher Stowe published *Uncle Tom's Cabin; or, Life Among the Lowly*. The situation changed, as it were, overnight.

The evils of slavery were presented in a story of absorbing interest; the heart of the people was touched, and the abolition of slavery became inevitable.

The peace movement has had its Harriet Beecher Stowe; and the Baroness von Suttner's novel, *Die Waffen Nieder* (Lay Down your Arms), published in 1889, can properly be compared with *Uncle Tom's Cabin*. It has been translated into many languages. It has shown the horrors of war just as its prototype showed the horrors of slavery. Both reached the heart and, through the heart, the conscience. Slavery was in 1852 discredited and confined to particular localities. Mrs. Stowe's triumph was therefore easier and more immediate. The war system is not confined to any locality, and it can not be said that however opposed by the select few it was discredited by the many. But the Baroness von Suttner's book called attention to it in such a way as to put it on the defensive; and the style of the novel and its incidents were so interesting in themselves as to compel attention. This is the service which this high minded and gifted woman rendered to the cause of mankind.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Vie Int.*, La Vie Internationale, Brussels; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletin, bulletin, bolletino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletin de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain, Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L'Int. Sc.*, L'Internationalism Scientifique, The Hague; *Mém. dipl.*, Memorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *Martens*, Nouveau recueil générale de traités, Leipzig; *Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

January, 1913.

9 France—Great Britain. Agreement announced concerning the shipment of arms and ammunition to Persia and the Indian frontier. *N. Y. Times*, January 19, 1913.

9 Abyssinia—Great Britain. Announcement of British Order in Council establishing courts for the benefit of British subjects in Abyssinia. *N. Y. Times*, January 19, 1913.

10 France—Netherlands. The protocol concerning maritime rules, signed December 17, 1909, was ratified by a note which contained further agreement upon the subject. French text: *Martens* (3), *7*:770.

12 Belgium—Bolivia. Consular convention, signed August 21, 1911, promulgated by Belgium. French text: *Mém. dipl.*, *51*:631.

February, 1913.

15 France—Spain. The delegates to the Franco-Spanish arbitration tribunal, under *compromis* provided for in Art. 27 of

February, 1913.

the convention of November 27, 1912, convened in Morocco. The arbitrator for France is A. Fabry, and for Spain, M. Léone. In case of disagreement the King of England will name a third arbitrator. *La Paix par le droit, 23*:151.

18 BELGIUM—GERMANY. Exchange of notes concerning customs duties. German and French texts: *Reichs G., 1913*:743.

28 GERMANY—RUSSIA. Convention for the protection of literary and artistic property signed. French text: *Arch. dipl., 129*:5.

March, 1913.

8 GREECE. Law regulating maritime prize courts. *J. O.* (Greece), March 26, April 8, 1913; French text: *R. gén. de dr. int. pub., 21 (doc.)*:34.

15 DENMARK—SIAM. Treaty concerning extraterritorial jurisdiction signed. Ratifications exchanged at Bangkok, June 12, 1913. French text: *Martens (3), 7*:674.

31 BRAZIL—DOMINICAN REPUBLIC. Ratifications exchanged of the arbitration convention signed April 29, 1910. Spanish and Portuguese texts: *Martens (3), 8*:156; *Diario do Brazil*, June 8, 1913.

April, 1913.

26 BULGARIA—ROUMANIA. The ambassadors of Germany, Austria, England, Italy and France, signed protocol relative to frontier of Dobroudja. French text: *Arch. dipl., 130*:295.

May, 1913.

19 AUSTRIA-HUNGARY—SWEDEN. Ratifications exchanged of treaty signed June 22, 1911, interpreting the treaties of commerce and navigation signed November 3, 1873 and April 25, 1911. French and German texts: *Martens (3), 8*:296.

June, 1913.

5–10 INTERNATIONAL CONFERENCE for the protection of submarine cables met in London. French text of resolutions adopted: *La Vie Int., 4*:136.

19 PORTUGAL—SWITZERLAND. Renewal of arbitration convention which expired August 18, 1913. *Rapport du conseil ad. de la cour permanente d'arbitrage, 1913.*

July, 1913.

17 MEXICO—TURKEY. Ratifications exchanged of consular convention signed December 23, 1910. French text: *Martens (3), 8*:286.

August, 1913.

8 CHILE—ITALY. Arbitration convention signed. *Rapport du conseil ad. de la cour permanente d'arbitrage, 1913.*

September, 1913.

18 GREAT BRITAIN—SIAM. Extradition convention signed. *Martens (3), 8*:194.

22 FRANCE—GREECE. French decree proclaiming convention for the protection of dramatic property signed April 22, 1912. French text: *Arch. dipl., 130*:198.

November, 1913.

1 FIFTH CONFERENCE ON WEIGHTS AND MEASURES MET AT PARIS. Twenty-six states were represented. *La Vie Int., 4*:137.

18 ECUADOR—ITALY. General treaty of arbitration, signed Feb. 25, 1911, promulgated by Ecuador. Spanish text: *B. Rel. Ext.* (Chile), *42*:93.

19 ITALY—URUGUAY. Convention signed referring to the arbitration of the King of Belgium the claim relating to the Italian ship *Maria Madre*. Spanish text: *B. Rel. Ext.*, (Chile), *42*:91.

December, 1913.

18 FRANCE—TURKEY. Treaty signed referring to arbitration the French claims against Turkey. Under the treaty the *compromis* went into effect upon the approval of Turkey, which was given April 25, 1914. French text: *J. O., 1913*:3853.

23 BELGIUM—FRANCE. Convention signed relating to pasturage on frontiers. *Arch. dipl., 130*:325.

January, 1914.

1–8 SIXTH CENTRAL AMERICAN CONFERENCE MET AT TEGUCIGALPA.

31 GREAT BRITAIN—ITALY. Renewal of arbitration convention which expired February 1, 1914. *Rapport du conseil ad. de la cour permanente d'arbitrage, 1913;* Italian and English texts: *G. B. Treaty Series*, No. 4, 1914.

February, 1914.

2 FRANCE—PERU. Arbitration convention signed referring French claims against Peru to the Hague Tribunal. French text of decree promulgating, February 12, 1914. *Mém. dipl., 52*:120.

4 FRANCE—GREAT BRITAIN. Exchange of notes respecting the trade in arms and ammunition at Muscat. French and English texts: *G. B. Treaty Series*, No. 9, 1914.

14 AUSTRIA—FRANCE—GERMANY—GREAT BRITAIN—ITALY—RUSSIA—TURKEY. Exchange of notes relating to the Aegean Islands. French text: *Arch. dipl., 130*:239.

15 GREAT BRITAIN—SPAIN. Exchange of notes renewing for a further period of five years the arbitration convention signed February 27, 1904. Spanish and English texts: *Arch. dipl., 130*:241; *G. B. Treaty Series*, No. 3, 1914.

26 GREECE—NETHERLANDS. Dutch decree promulgating the convention signed March 11, 1913, submitting to arbitration the claim of Edward Narik, a Dutch citizen, against Greece. French and Dutch texts: *Staatsb., 1914*, No. 58.

March, 1914.

7 ECUADOR—ITALY. Ratifications exchanged of the convention additional to the treaty of commerce signed February 26, 1911. *B. Rel. Ext.* (Ecuador), *1914*:752.

14 SPAIN—SWITZERLAND. Exchange of ratifications of arbitration treaty signed June 18, 1913. Spanish text: *Ga. de Madrid, 1914, 2*:174.

April, 1914.

1 UNITED STATES. Hon. Robert Lansing took the oath of office as Counselor of the Department of State. Mr. Lansing was associate counsel for the United States in the Behring Sea Arbitration, 1892–3; counsel for the United States, Behring Sea Claims Commission, 1896–7; solicitor for the United States, Alaskan Boundary Tribunal, 1903; counsel for the United States, North Atlantic Coast Fisheries at The Hague, 1909–1910; agent for the United States, American and British Claims Arbitration, 1912–1914. Mr. Lansing is a member of the American Society of International Law and a member of the Board of Editors of this JOURNAL.

1 KOREA—JAPAN. Japan assumed the management of the six foreign settlements in Seoul, according to the agreement of April, 1913,

April, 1914.

between the foreign office of Chosen and the consular representatives of the interested powers. *N. Y. Herald*, April 3, 1914.

2 THIRD HAGUE CONFERENCE. Announced that the Russian National Preparatory Committee has decided not to raise the question of disarmament on the ground that it would be premature. *Times*, April 3, 1914.

3 GREAT BRITAIN—GREECE. Exchange of notes recording an agreement between the respective governments relating to commercial travellers' samples. French and English texts: *G. B. Treaty Series*, No. 8, 1914.

6 COLOMBIA—UNITED STATES. Treaty signed restoring friendly relations between the two countries. An indemnity of $25,000,000 is to be paid to Colombia within six months after ratifications have been exchanged. Colombian coastwise ships are exempted from tolls in the Panama Canal. The Colombia-Panama boundary is to be based upon the law of June 9, 1855 marking the boundaries of the former State of Panama. The United States is to lend its good offices for the settlement of pending questions between Colombia and Panama. The treaty contains this clause, to which exception is taken: "Expressing regret that anything should have occurred." The treaty was approved by both houses of the Colombian Congress, June 9, 1914. Not yet acted upon by the United States Senate. *R. of R.* (N. Y.), *49*:682.

9 MEXICO—UNITED STATES. The paymaster and boat crew of the *U. S. S. Dolphin* landed at Tampico for supplies and were arrested and detained for two hours by Mexican soldiers, being finally released with an apology. Rear Admiral Mayo, in command of the American ships before Tampico, was not satisfied with the apology given and demanded that the Mexican forts fire by 6 p. m., a salute of twenty-one guns to the American flag. The Mexican authorities refused to fire the salute unless the American ships returned the same number of guns. The President of the United States presented an ultimatum to President Huerta demanding a full and unconditional salute of the American flag before 6 p. m., April 19. This was refused. On April 20, President Wilson read a message to Congress asking authority to "use the armed forces of the United States in such ways and to such an extent as may be necessary to obtain from

April, 1914.

General Huerta and his adherents the fullest recognition of the rights and dignity of the United States," and on April 22 a joint resolution justifying the use of force was adopted by Congress. On April 21, to prevent the landing of a cargo of 15,000,000 rounds of ammunition and 200 rapid fire guns brought over to Huerta in the German ship *Ypiranga*, the President directed Admiral Fletcher to take possession of the customs house at Vera Cruz. Marines and sailors were landed and the customs house captured, the American loss being 19 killed and 70 wounded, the Mexican loss being 126 killed and 195 wounded. The fighting was continued the second day. On April 22, the American Chargé was handed his passports by General Huerta, and on April 23, the Mexican Chargé at Washington asked for and received his passports. On April 23, President Wilson restored the embargo on the shipment of arms into Mexico. On April 24, several Mexicans were killed while attempting to dynamite the international bridge at Laredo, Texas, by American soldiers. On April 24, the Fifth Brigade of the United States Army sailed from Galveston for Vera Cruz, and on the 30th General Funston assumed control of Vera Cruz. On April 25 the United States accepted the offer of Argentina, Brazil and Chile to act as mediators in the dispute. On April 27 the Huerta Government accepted the offer of mediation and on April 28 Carranza and Villa the Constitutionalists agreed not to oppose the occupation of Mexican territory by the United States so long as territory controlled by the revolutionists is not invaded. A virtual armistice went into effect without formal agreement between the United States and the Huerta Government. Since the armistice went into effect, the German steamers *Ypiranga* and *Bavaria* landed the arms and ammunition at Puerto Mexico on May 26, but shipments to the revolutionists from Galveston and New York were stopped by the United States.

The mediation conference held its first meeting at Niagara Falls, Canada, May 20. The mediators are: the Brazilian Ambassador, Señor Dominicio da Gama, President of the Conference; Señor Don Eduardo Suarez, Minister from Chile to the United States; Señor Romulo S. Naon, Minister from Argentina to the United States; delegates from Mexico, Señor Rabasa, Señor

April, 1914.

Rodriguez and Señor Elguera; delegates from the United States, Hon. Joseph Rucker Lamar, Associate Justice of the Supreme Court of the United States, Mr. Frederick E. Lehman, former Solicitor General of the United States. The first protocol, relating to the formation of a provisional government, was signed June 12, and the final protocol on June 24. The conference took a recess on June 30. No formal adjournment took place. See this Journal, *8*:578.

10 GREAT BRITAIN—UNITED STATES. Ratifications exchanged of the agreement signed May 31, 1913, extending the duration of the arbitration convention of April 4, 1908. Text: *U. S. Treaty Series*, No. 587; *G. B. Treaty Series*, No. 6, 1914.

13 ITALY—UNITED STATES. Ratifications exchanged of convention signed May 28, 1913, extending duration of the arbitration convention of March 28, 1908. English and Italian texts: *U. S. Treaty Series*, No. 588.

15 NORWAY—UNITED STATES. Proclamation by the United States of the arbitration convention extending duration of the convention signed April 4, 1908, ratifications of which were exchanged April 13, 1914. English and Norwegian texts: *U. S. Treaty Series*, No. 589.

23 FRANCE—SWITZERLAND. French law putting into effect the convention regulating the use of the water-power of the river Rhone, signed Oct. 4, 1913. French text: *J. O.*, *1913*:3878.

23 MEXICO—UNITED STATES. The President of the United States restored the embargo on the shipment of arms into Mexico. See this JOURNAL, *8*:582.

25 AUSTRIA. By a ministerial decree Austria stopped the emigration of youths and men under thirty-five years of age unless they have performed full military service.

27 SWITZERLAND—UNITED STATES. Ratifications exchanged of convention signed Nov. 3, 1913 extending the duration of the arbitration convention of February 29, 1908. English and French texts: *U. S. Treaty Series*, No. 590; French text: *Arch. dipl.*, *130*:324.

28 RUSSIA—TURKEY. Announcement of accord relating to duties and the admission of Russian delegates into the administrative council regulating the public debt. This accord is not to go into effect until consented to by the Powers. *Q. dipl.*, *37*:623.

April, 1914.

30 GREAT BRITAIN—UNITED STATES. The American-British Claims Arbitration Tribunal, which had been sitting since March 12, adjourned. The cases heard were the Newchwang, Eastry, Elizabeth Cadenhead, Frederick Gerring, Tattler, Wanderer, Thomas F. Bayard, David J. Adams, Favorite, H. J. R. Hemming, Lord Nelson, Argonaut, Kate, Coquitlan, Great Northwestern Telegraph Co., Col. James H. French, Home Missionary Society, Pescawha, Adolph G. Studer and Sidra.

Awards were rendered in the case of Elizabeth Cadenhead, Great Northwestern Telegraph Co., Eastry, Lord Nelson, Frederick Gerring, Jr., and La Canadienne.

The sessions of the Tribunal will be held in Paris during the months of July and August, 1914, for the purpose of handing down awards in claims argued at the past session. Another session of the Tribunal will be held in Washington, beginning January, 1915, for the purpose of hearing arguments of claims in the first schedule.

May, 1914.

2 GERMANY—TURKEY. By an exchange of notes the treaty of commerce and additional convention relating to customs which expired June 25, has been prolonged for one year. *Q. dipl., 37*:623.

4 FRANCE—ITALY—SPAIN. Exchange of notes relating to Lybia and Morocco. French text: *Mém. dipl., 51*:290; *R. gén. de dr. int. pub. 20; doc.: 33; R. di dir. int., 2 (2)*:425.

5 ITALY—UNITED STATES. Treaty signed following the lines of the peace plan of the Secretary of State of the United States. Any question is to be submitted to an international commission of five members. In general the treaty is similar to the Netherland treaty, but no provision is made for maintaining the *status quo* in military and naval preparations. *Washington Post*, May 6, 1914.

5 Death of Judge E. J. Dillon, authority on municipal corporations and railroad law, and member of the Institut de Droit International.

6 GREAT BRITAIN—HAITI. The representative of Great Britain informed the Haitian government that he was instructed to leave the country unless a certain claim of a British subject for $12,000, for property destroyed during the Le Conte revolution was paid immediately. It was reported that the ultimatum was backed by

the presence of a British cruiser. This claim was adjudicated under the convention signed April 6, 1906. The Haitian Government complied with the demands. *Times*, May 7, 1914.

6 FRANCE—MONACO. French decree promulgating customs convention signed April 10, 1912. French text: *J. O., 1914*:4181.

8 FRANCE—SPAIN. French decree promulgating fisheries convention signed September 23, 1913. French text: *J. O., 1914*:4606.

13 SALVADOR—UNITED STATES. Treaty signed renewing for further period of five years the arbitration treaty which expired July 3, 1913.

17 CHINA. Announcement made of a proposed $30,000,000 loan to China by the Bethlehem Steel Trust of the United States, for the construction of a naval dock, with platform for heavy coast defence guns at Foochow. This loan is said to have been originally negotiated by Prince Tsai-hsung in 1909, and while it is not known that a contract was actually signed at that time, it seems certain that pledges were exchanged and the present government finds itself bound. The agreement is said to provide for the repayment of the loan in 35 years, the floating dock to be security. Only American engineers and material are to be used. There is a proviso that one-third of the sum shall be paid the Chinese Government within three months of the signature, to be used as that government may see fit, the remaining two-thirds being bound to be used in the construction of the dock. *Times*, May 18, 1914.

18 The Panama Canal was opened for regular traffic.

19 ALBANIA. During disorders at Durazzo, Albania, Austrian and Italian cruisers appeared, and Essad Pasha Toptani, Albanian Prime Minister, accused of plotting against the new Albanian Government, was arrested, with his wife, and hurried aboard an Austrian cruiser.

23 JAPAN—UNITED STATES. Ratifications exchanged of the agreement signed at Washington, June 28, 1913, renewing the arbitration convention of May 5, 1908. English text: *U. S. Treaty Series*, No. 591.

26 TIBET. Russia has assented in principle to the arrangement affecting the Anglo-Russian convention which has been signed at Simla in respect to the autonomy of Tibet. *Times*, May 26, 1914.

May, 1914.

27 PERMANENT COURT OF ARBITRATION AT THE HAGUE. The Report of the Administrative Council of the Permanent Court of Arbitration at The Hague, 1913, announced the list of members of the court as follows, with date of original appointment and last appointment:

Argentine Republic:

His Excellency Mr. Estanislas S. Zeballos, Doctor of Laws, Professor of International Private Law at the University of Buenos Aires, Ex-Minister of Foreign Affairs and Religion, July 6, 1907; June 12, 1913;

His Excellency Mr. Luis Maria Drago, Doctor of Law, former Minister of Foreign Affairs and Religion, member of the Faculty of Law of the University of Buenos Aires. July 6, 1907; June 12, 1913;

His Excellency Mr. Carlos Rodriguez Larreta, Doctor of Law, former Minister of Foreign Affairs and Religion, former Professor of Constitutional Law in the University of Buenos Aires, Envoy Extraordinary and Minister Plenipotentiary of Argentine Republic at Paris. July 6, 1907; June 12, 1913;

Mr. Joaquin V. Gonzalez, Doctor of Law, Senator, President of the University of La Plata, former Minister of the Interior, former Minister of Foreign Affairs and Religion, former Deputy and former Minister of Justice and Public Instruction. October 17, 1910.

Austria-Hungary:

Mr. Henry Lammasch, Doctor of Law, Aulic Councilor, Professor of International Law at the University of Vienna, Member of the House of Peers of the Austrian Parliament, etc. December 4, 1900; December 4, 1912;

His Excellency Mr. Albert de Berzeviczy, Privy Councilor, former Minister of Religion and Public Instruction of Hungary, President of the Hungarian Academy of Science and Letters, member and former President of the Chamber of Deputies of the Hungarian Parliament, etc. October 22, 1902; February 26, 1909;

His Excellency Baron Ernest von Plener, Doctor of Law, Privy Councilor, President of the Supreme Court of the Commune of Comptes, member of the House of Peers of the Austrian Parliament, etc. February 26, 1909;

May, 1914.

His Excellency Mr. François de Nagy, Doctor of Law, Privy Councilor, former Secretary of State, Professor of Law in the Royal Hungarian University of Buda Pest, member of the Chamber of Deputies of the Hungarian Parliament, etc. December 4, 1912.

Belgium:

His Excellency Baron Descamps, former Minister of Sciences and Arts, Senator, Secretary-General of the *Institut de Droit International*, Professor of Law in the University of Louvain. October 6, 1900; October 6, 1912;

Mr. Ernest Nys, Counsellor of the Court of Appeals of Brussels, Professor of Law at the University of Brussels. September 5, 1905; September 14, 1911;

Mr. Arendt, Honorary Director-General of the Ministry of Foreign Affairs. January 23, 1907; January 23, 1913;

Mr. J. van den Heuvel, Minister of State, former Minister of Justice, Professor of Law in the University of Louvain. November 6, 1912.

Bolivia:

His Excellency Mr. Severo Fernandez Alonsó, Doctor of Law, former President of the Republic, former Professor of International Law in the University of Chuquisaca, Envoy Extraordinary and Minister Plenipotentiary of Bolivia to Argentine Republic. September 13, 1907; December 1, 1913;

His Excellency Mr. Claudio Pinílla, Doctor of Law, former Minister of Foreign Affairs, Minister of State. September 12, 1907; December 1, 1913;

His Excellency Mr. Ignacio Calderón, former Minister of Finance, Envoy Extraordinary and Minister Plenipotentiary of Bolivia to the United States. February 14, 1910; December 1, 1913;

His Excellency Mr. Eliodoro Villazón, Doctor of Law, former President of the Republic. December 1, 1913.

Brazil:

His Excellency Mr. Lafayette Rodriguez Pereira, Doctor of Law, former Senator, former State Councilor, former President of the Council of Ministers during the Empire. September 13, 1907; February 11, 1914;

May, 1914.

His Excellency Mr. Ruy Barbosa, Doctor of Law, Senator, former Ambassador, former Vice-President of the Provisional Government of the Republic, member of the Academy of Brazil. September 13, 1907; February 11, 1914;

His Excellency M. Clovis Bevilaqua, Doctor of Law, Jurisconsult of the Ministry of Foreign Affairs, Professor of the Faculty of Law of the University of Recife, member of the Academy of Brazil. September 13, 1907; February 11, 1914;

His Excellency Mr. Ubaldino do Amaral Fontoura, Doctor of Law, former Senator, former Prefect of the Federal District. February 11, 1914.

Bulgaria:

Mr. Nicolas Ghénadieff, Doctor of Law, lawyer, former Minister of Foreign Affairs. July 10–23, 1913;

His Excellency Mr. Dimitri Stanicoff, Doctor of Law, former Minister of Foreign Affairs, Envoy Extraordinary and Minister Plenipotentiary of Bulgaria to Brussels and Paris. July 10–23, 1901; July 10–23, 1913.

Chile:

Mr. Carlos Concha, Doctor of Law, former Minister of War and Marine, former President of the Chamber of Deputies, former Envoy Extraordinary and Minister Plenipotentiary of Chile at Buenos Aires. October 17, 1907; January 26, 1914;

His Excellency Mr. Miguel Cruchaga, Doctor of Law, former President of the Council, Envoy Extraordinary and Minister Plenipotentiary to Buenos Aires. October 17, 1907; January 26, 1914;

Mr. Manuel Alejandro Alvarez, Doctor of Law, *Elève Diplomé* of the *Ecole des sciences morales et politiques de Paris*, Technical Councilor of the Ministry of Foreign Affairs. October 17, 1907; January 26, 1914;

Mr. Eliodoro Yanez, advocate of the Court of Appeals at Santiago de Chile, former Deputy, former Minister of Foreign Affairs, Senator. May 31, 1913.

China:

His Excellency Mr. Wu Ting Fang, former Envoy Extraordinary and Minister Plenipotentiary at Washington, former Im-

May, 1914.

perial Commissioner for the Revision of the Laws of China. April 4, 1905; April 29, 1911;

His Excellency Mr. Hoo Wei Teh, former Under Secretary of State of the Wai Chaiao Pu, Envoy Extraordinary and Minister Plenipotentiary to Paris. April 20, 1910;

Mr. J. van den Heuvel, Minister of State of Belgium, former Minister of Justice, and Professor of Law in the University of Louvain. April 20, 1910.

Colombia:

General Jorge Holguin, former Chargé of the Executive Power, former Minister of Foreign Affairs. March 26, 1908;

General Marceliano Vargas, former Minister Plenipotentiary at Paris, former Minister of the Interior. March 26, 1908;

His Excellency Mr. J. Marcelino Hurtado, Envoy Extraordinary and Minister Plenipotentiary at Rome. March 26, 1908;

Mr. Filipe Diaz Erazo, Councilor of the Legation at Paris. March 26, 1908.

Cuba:

Mr. Antonio Sanchez de Bustamante, Doctor of Law, Senator, Professor of International Public and Private Law at the University of Havana. January 11, 1908; January 29, 1914;

His Excellency Mr. Gonzalo de Quesada, former Envoy Extraordinary and Minister Plenipotentiary at Washington, Envoy Extraordinary and Minister Plenipotentiary at Berlin. January 11, 1908; January 29, 1914;

His Excellency Mr. Manuel Sanguily, former Senator, former Minister of Foreign Affairs, Inspector General of the Navy. January 11, 1908; January 29, 1914;

Mr. Cosme de la Torriente, former Secretary of State. January 29, 1914.

Denmark:

His Excellency Mr. J. H. Deuntzer, Privy Councilor, former President of the Council and Minister of Foreign Affairs, former Professor of Law in the University of Copenhagen, Extraordinary Councilor of the Supreme Court. October 14, 1910;

Mr. Axel Vedel, Chamberlain, former Director of the Ministry of Foreign Affairs, Prefect of the Département of Praestoe. October 10, 1910;

May, 1914.

Mr. C. E. Cold, Councilor of the Court of Appeals of Copenhagen. October 10, 1910;

Mr. D. Nyholm, Honorary Councilor of State, judge of the Mixed Courts of Egypt, Councilor *hors cadre* of the Court of Appeals of Copenhagen. October 9, 1913.

Dominican Republic:

Mr. Apolinar Tejera, Secretary of State for Justice and Public Instruction. September 16, 1907; May 12, 1913;

Mr. Cabral i Baez, lawyer, former Minister of Foreign Affairs. May 13, 1914;

Mr. Manuel A. Bachado, lawyer, former Minister of Foreign Affairs. May 13, 1914;

Mr. de J. Froncoso de la Concha, lawyer, Councilor before the Supreme Court. May 13, 1914.

Ecuador:

His Excellency Mr. Honorato Vazquez, Doctor of Law, Deputy, Senator, Under-Secretary of State in the Ministry of Public Instruction and Foreign Affairs, Rector of the University of Azuay, former Envoy Extraordinary and Minister Plenipotentiary at Lima and at Madrid. November 18, 1907; January 20, 1914;

His Excellency Mr. Victor Rendón, former Envoy Extraordinary and Minister Plenipotentiary at Paris. November 18, 1907; January 30, 1914;

His Excellency Mr. Gonzalo F. Córdova, Doctor of Law, former Deputy, former Senator, former Minister of State, Envoy Extraordinary and Minister Plenipotentiary at Washington. January 30, 1914;

His Excellency Mr. Augusto Aguirre Aparicio, Doctor of Law, Envoy Extraordinary and Minister Plenipotentiary at Lima. January 30, 1914.

France:

Mr. Léon Bourgeois, Doctor of Law, former Minister of Labor and Social Providence, Minister of Foreign Affairs, former President of the Chamber of Deputies, former President of the Council, Senator. November 16, 1900; November 16, 1912;

Mr. Decaris, former Ambassador, former Minister of Colonies, Senator. May 21, 1905; November 16, 1912;

May, 1914.

Baron d'Estournelles de Constant, Minister Plenipotentiary, Senator. November 16, 1900; November 16, 1912;

Mr. Louis Renault, Minister Plenipotentiary, member of the *Institut de Droit International*, Professor of the Faculty of law of the University of Paris and the *Ecole libre des sciences politiques*, Councilor of the Ministry of Foreign Affairs. November 16, 1900; November 16, 1912.

Germany:

His Excellency the Chevalier von Treutlein-Moerdes, Director of the Royal Ministry of Justice of Bavaria, Councilor of State. January 21, 1914;

Mr. Johannes Kriege, Doctor of Law, Privy Councilor of Legation, Director of the Department of Foreign Affairs, Plenipotentiary of the Federal Council. November 30, 1906; November 30, 1912;

Mr. Ferdinand von Martitz, Doctor of Law, Privy Councilor, Professor of Law in the University of Berlin. November 30, 1900; November 30, 1912;

Mr. von Staff, Doctor of Law, President of the Supreme Court of Marienwerder. May 19, 1911.

Great Britain:

The Right Honorable Sir Charles Fitzpatrick, Chief Justice of Canada. September 30, 1907; September 30, 1913;

The Right Honorable Count de Desart, Privy Councilor, former Procurer-General of the King. January 1, 1910;

The Right Honorable Viscount James Bryce, Doctor of Law, Privy Councilor, former Ambassador to Washington, former Regius Professor of Civil Law at the University of Oxford. January 28, 1913.

Greece:

Mr. Denis Stephanos, Deputy, former Minister of Foreign Affairs. December 16–29, 1901; March 5–18, 1908;

His Excellency Mr. Georges Streit, Minister of Foreign Affairs, former Envoy Extraordinary and Minister Plenipotentiary at Vienna, former Professor of Public and Private International Law at the University of Athens, member of the *Institut de Droit International*. December 16–29, 1901; March 5–18, 1908;

Mr. Michel Kebedgy, former Councilor of the Mixed Court of

May, 1914.

Egypt, former Professor of Public and Private International Law at the University of Berne, member of the *Institut de Droit International*. December 16–29, 1901; March 5–18, 1908;

Mr. A. Typaldo Bassia, Deputy, Associate Professor of Political Economy at the University of Athens. January 9–22, 1909.

Guatemala:

Mr Antonio Batres Jáuregui, Councilor of State, former President of the Judicial Power and of the Supreme Court, former Minister of Foreign Affairs and of Public Instruction; former Envoy Extraordinary and Minister Plenipotentiary at Washington, Rio de Janeiro, etc. February 8, 1910;

Mr. Carlos Salazar, temporary Dean of the Faculty of Law, Advocate of Guatemala before the Central American Court of Justice, former member of the Court of Appeals. February 8, 1910;

Mr. Antonio Gonzalez Saravia, Doctor of Law, member of the Supreme Court. July 5, 1913;

Mr. Alberto Mencos, Doctor of Law, former Minister on special missions to Salvador and Spain. July 5, 1913.

Haiti:

Mr. Jacques Nicolas Leger, lawyer, President of the Legislative Society of Port au Prince, former Envoy Extraordinary and Minister Plenipotentiary at Washington. July 21, 1908;

Mr. Solon Menos, lawyer, former President of the Legislative Society of Port au Prince, former President of the Bar Association of Port au Prince, former Secretary of State for Finance, of Commerce, Justice and Foreign Relations. July 21, 1908;

Mr. F. D. Legitime, publicist, former President of the Republic. July 21, 1908;

Mr. Tertullien Guilbaud, lawyer, secretary of State of Public Instruction and Justice, former Chief of the Cabinet of Haiti, former member of the Constitutional Assembly of Haiti, former Senator. July 21, 1908.

Italy:

His Excellency, Mr. Guido Fusinato, Doctor of Law, Minister of State, former Minister of Public Instruction, Honorary Professor of International Law at the University of Turin, Deputy, Councilor of State. December 7, 1908;

May, 1914.

Mr. Victor Emmanuel Orlando, lawyer, Professor of Constitutional Law in the University of Rome. Deputy, former Minister of Justice. April 20, 1910,

His Excellency Mr. Tommaso Tittoni, Doctor of Law, former Minister of Foreign Affairs, Senator, Ambassador at Paris. April 24, 1911;

Mr. Charles Schanzer, Doctor of Law, Deputy, President of a section of the Council of State, former Minister of Posts and Telegraphs. December 12, 1912.

Japan:

His Excellency Baron Itchiro Motono, Doctor of Law, Ambassador at St. Petersburg. November 30, 1900; November 30, 1912;

Mr. Henry Willard Denison, Councilor of the Ministry of Foreign Affairs. November 30, 1900; November 30, 1912.

Luxemburg:

Mr. Henri Vannerus, President of the Council of State, President of the Supreme Court. October 10, 1903; October 10, 1909.

Mexico:

Mr. José Ives Limatour, Doctor of Law, former Secretary of State for Finance and Public Credit, member of the *Institut de France*, associate of the *Academie des sciences morales et politiques*. March 7, 1907; December 27, 1913;

Mr. Pablo Macedo, Doctor of Law, former President of the Monetary Commission, former Director of the National School of Jurisprudence of Mexico. March 7, 1907; December 27, 1913;

Mr. Joaquin D. Casasús, Doctor of Law, former Ambassador at Washington, former Director of the National School of Jurisprudence of Mexico. June 2, 1908;

His Excellency Mr. Carlos Pereyra, Envoy Extraordinary and Minister Plenipotentiary at Brussels and The Hague. December 27, 1913.

Nicaragua:

Mr. Désiré Pector, former Consul-General of Honduras and Nicaragua at Paris. March 3, 1908.

Norway:

Mr. G. Gram, former Minister of State, Governor of Province. November 17, 1900; December 22, 1912.

May, 1914.

His Excellency Mr. George Francis Hagerup, Doctor of Law, former Minister of State and President of the Council, Envoy Extraordinary and Minister Plenipotentiary at Copenhagen and The Hague, member of the Nobel Committee of the Storthing, member of the *Institut de Droit International.* January 23, 1903; December 11, 1908;

Mr. Sigurd Ibsen, Doctor of Law, former Minister of State. March 21, 1906; March 9, 1912;

Mr. H. J. Horst, former President of the Lagthing, President of the Norwegian Group of the Interparliamentary Union, member of the Interparliamentary Council, member of the Nobel Committee of the Storthing, member of the Commission of the International Peace Bureau. March 31, 1906; March 9, 1912.

Netherlands:

His Excellency Jonkheer A. S. de Savorin Lohman, Doctor of Law, Minister of State, former Minister of the Interior, former Professor of the Free University of Amsterdam, member of the Second Chamber of the States General. November 1, 1900; November 1, 1912;

Jonkheer G. L. M. H. Ruys de Beerenbrouck, Doctor of Law, former Minister of Justice, member of the State Council on Extraordinary Service, Queen's Commissioner in the Province of Limbourg. November 1, 1900; November 1, 1912;

His Excellency M. P. W. A. Cort van der Linden, Doctor of Law, former Minister of Justice, former member of the State Council, Minister of the Interior. November 1, 1912;

His Excellency Jonkheer A. P. C. van Karnebeek, Doctor of Law, Minister of State, former Minister of Foreign Affairs. October 24, 1913.

Panama:

Mr. Ramon Valdés, Doctor of Law, Minister Resident of Panama at London and Brussels. July 12, 1913;

His Excellency Mr. Belisario Porras, Doctor of Law, former Envoy Extraordinary and Minister Plenipotentiary at San José, and at Washington, President of Panama, 1912–1916. March 18, 1911.

Peru:

Mr. Rámon Ribeyro, Doctor of Law, President of the Supreme

May, 1914.

Court, Professor of Public International Law in the University of Lima, former Minister of State. May 23, 1910;

Mr. Luis F. Villarán, Doctor of Law, Rector of the University of Lima, member of the Supreme Court, former Minister of State. May 23, 1910;

His Excellency Mr. Manuel Alvarez Calderon, Doctor of Law, Professor in the University of Lima, Envoy Extraordinary and Minister Plenipotentiary at Brussels and Berne. May 23, 1910;

Mr. Lizardo Alzamora, Doctor of Law, Member of the Supreme Court, Professor of the Faculty of Law, former dean of the same faculty, former Minister of Justice, etc., etc. May 12, 1905; June 2, 1913.

Persia:

His Excellency Mirza Hassan-Kahn Mouchir ed Dovleh, former Envoy Extraordinary and Minister Plenipotentiary at St. Petersburg, Minister of Public Instruction. May 12, 1905, June 2, 1913.

Portugal:

His Excellency Mr. Fernando Mattoso Santos, former Minister of Finance and Foreign Affairs. November 13, 1903; November 14, 1909;

His Excellency Mr. José Capello Franço Frazão (Comte de Penha Garcia), former President of the Chamber of Deputies. May 25, 1910;

His Excellency Mr. Arturo Pinto Miranda Montenegro, former Minister of Justice. May 26, 1909.

Roumania:

Mr. Théodore G. Rosetti, former President of the Council of Ministers, former President of the High Court of Appeals and Justice, Senator. November 21, 1900; November 21, 1912;

Mr. Jean N. Lahovary, former Minister of Foreign Affairs, former Envoy Extraordinary and Minister Plenipotentiary, former Secretary of State for the Departments of Agriculture and Customs, Deputy. November 21, 1900; November 21, 1912;

Mr. Constantin G. Dissescu, Secretary of State for the Department of Religion and Public Instruction, Professor of the University of Bucarest, Senator. November 21, 1906; November 21, 1912.

May, 1914.

Russia:

His Excellency Mr. A. Sabouroff, Secretary of State, member of the Council of the Empire, President of the First Department of the Council of the Empire, Senator, Privy Councilor. December 20, 1909;

His Excellency Mr. Tagantzeff, member of the Council of the Empire, Senator, Privy Councilor. December 20, 1909;

His Excellency Baron Michel de Taube, Doctor of Law, Adjunct Minister of Public Instruction, Privy Councilor. December 20, 1909.

Salvador:

Mr. Manuel Delgado, Doctor of Law, former Minister of Foreign Affairs, former Envoy Extraordinary and Minister Plenipotentiary, former Rector of the National University. November 2, 1909;

Mr. Salvador Gallegos, Doctor of Law, former Minister of Foreign Affairs, former Envoy Extraordinary and Minister Plenipotentiary. November 2, 1909;

Mr. Salvador Rodriguez González, Doctor of Law, Secretary of State for the Ministry of Foreign Affairs, of Justice and Public Worship. November 2, 1909;

Mr. Alonso Reyes Guerra, Doctor of Law, Consul-General to Germany. August 7, 1911.

Servia:

His Excellency Mr. Georg Pavlovitch, former Minister of Justice, former Professor of the Faculty of Law of Belgrade, former President of the Court of Appeals. April 3–16, 1901; March 15–28, 1913;

His Excellency Mr. Milenko R. Vesnitch, Doctor of Law, former Minister of Justice, former President of the Scoupchtina, former Professor of the Faculty of Law of Belgrade, Envoy Extraordinary and Minister Plenipotentiary at Paris, member of the *Institut de Droit International.* April 3–16, 1901; March 15–28, 1913.

Siam:

Mr. Carragioni d'Orelli, Doctor of Law, Councilor of Legation, Paris. June 9, 1909;

Mr. Jens I. Westengard, Consul-General of Siam, Minister Plenipotentiary. March 6, 1911.

May. 1914.

Sweden:

His Excellency Mr. Knut Hjalmar Léonard de Hammarskjöld, Doctor of Law, former Minister of Justice, former Minister of Religion and Public Instruction, former Envoy Extraordinary and Minister Plenipotentiary at Copenhagen, former President of the Court of Appeals of Jönköping, former President of the faculty of Law of Upsala, former Governor of the Province of Upsala, President of the Council, Minister of War. December 2, 1904, November 26, 1910;

Mr. Johan Frederik Ivar Afzelius, Doctor of Law, President of the Court of Appeals of Stockholm, former Councilor of the Supreme Court, member of the First Chamber of the Diet. February 18, 1905; November 26, 1910;

Mr. Johannes Hellner, Doctor of Law, former Minister without portfolio, former member of the Supreme Court, member of the Second Chamber of the Diet. December 7, 1906; December 7, 1912;

His Excellency Baron Carl Nils Daniel Bildt, Doctor of Letters, Envoy Extraordinary and Minister Plenipotentiary at Rome, member of the Swedish Academy at Stockholm. December 7, 1906; December 7, 1912.

Switzerland:

His Excellency Mr. Charles Edouard Lardy, Doctor of Law, Envoy Extraordinary and Minister Plenipotentiary at Paris, member and former President of the *Institut de Droit International.* December 31, 1900; December 9, 1912;

Mr. Eugène Huber, Doctor of Law, Professor of Private Law in the University of Berne. June 10, 1905; March 19, 1912;

Mr. Leo Weber, Doctor of Law, former Federal Judge, Colonel of Military Justice and former Auditor-in-Chief of the Swiss army. January 3, 1910; January 1, 1913.

Turkey:

His Highness Ibrahim Hakky Pacha, former Grand-Vizier. January 28, 1909;

His Excellency Gabriel Nouradounghian, Senator, former Minister of Commerce and Public Works, former Minister of Foreign Affairs. January 28, 1909;

May, 1914.

His Excellency Yorghiadis Effendi, Senator. January 28, 1909;

His Excellency Said Bey, Vice-President of the legislative section of the Council of State. September 17, 1909.

United States:

Hon. George Gray, Doctor of Law, former Senator, Judge of the Circuit Court. October 11, 1900; November 27, 1912;

Hon. Oscar S. Straus, former Secretary of Commerce and Labor, former Ambassador to Constantinople. January 9, 1902; January 10, 1914;

Hon. Elihu Root, former Secretary of State, Senator for New York, associate member of the *Institut de Droit International.* December 15, 1910;

Hon. John Bassett Moore, Professor of International Law in Columbia University, former Counselor of the Department of State, member of the *Institut de Droit International.* November 27, 1912.

Uruguay:

Mr. Juan Pedro Castro, Doctor of Law, Senator, former Professor of civil law at the University of Montevideo, honorary member of the Council of Information, former President of the Senate, former Envoy Extraordinary and Minister Plenipotentiary at Paris and Brussels. August 9, 1907; August 9, 1913;

Mr. Juan Zorilla de San Martin, Doctor of Law, former Minister Plenipotentiary, former Professor of Public International Law. April 25, 1911;

Mr. José Pedro Massera, Doctor of Law, former Director General of Public Instruction, former Professor of Penal Law, member of the Chamber of Deputies. April 25, 1911;

Mr. Manuel B. Otero, lawyer, Senator, former Professor of the University of Montevideo. January 13, 1914.

Venezuela:

Mr. Nicomedes Zuloaga, Doctor of Law, lawyer, former member of the Court of Appeals. March 23, 1909;

Mr. Francisco Arroyo Parejo, Doctor of Law, lawyer, former Procurer General, Professor of Civil Law at the University of Caracas. March 23, 1909;

Mr. Carlos Léon, Doctor of Law, former Minister of Public

May, 1914.

instruction, former Member of the Court of Appeals, Professor of Political Economy and Sociology at the University of Caracas, March 23, 1900;

Mr. Manuel Antonio Matos, former Senator, former Minister of France. March 23, 1909.

27–29 THE LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION met at Mohonk Lake, New York. Hon. John Bassett Moore, formerly Counselor of the Department of State, presided.

28 PERU. Argentina, Brazil, Chile and the United States recognized the new Peruvian Government under the presidency of Col. Oscar Benavides. The United States recognized the provisional government of Peru, February 12, 1914.

28 AUSTRIA-HUNGARY—UNITED STATES. Ratifications exchanged of agreement, signed at Washington, May 6, 1914, extending duration of arbitration convention of January 15, 1909. English, German and Hungarian texts: *U. S. Treaty Series*, No. 592.

June, 1914.

1 MONGOLIA. In an identic note to the American, British, French and German Ministers to China, the Government of Mongolia reasserted that Mongolia was no longer under the jurisdiction of China, and begged that consuls, or other properly authorized representatives, be sent to Urga to conclude treaties of commerce and friendship similar to that concluded with Russia. The note states that this request has been made twice previously and no answer received. Mongolia has refused to participate in the proposed conference between China and Russia to determine Mongolian boundaries, and it is reported that a body of 5,000 well-equipped Hunghuzes are camping northwest of Chihfeng under orders for Urga in Inner Mongolia. *Times*, June 2, 1914.

5 FRANCE—GERMANY. French decree promulgating the convention regulating the sale of alcoholic beverages, signed January 13, 1914. French text: *J. O.*, *1914*:5010.

5 FRANCE—ITALY. French decree promulgating convention relating to marriage signed Aug. 4, 1912, ratifications of which were exchanged June 1, 1914. French text: *J. O.*, *1914*:5010.

June, 1914.

11 PANAMA TOLLS. The United States Senate passed, with an amendment affirming that the United States does not relinquish any rights under treaties between Great Britain and the United States, the bill repealing the tolls exemption clause in the Panama Canal Act. The House of Representatives passed the bill as amended June 11, and the President signed it June 15, 1914.

13 GREECE formally announces the annexation of the Turkish Islands of Chios and Mitylene.

15 GERMANY—GREAT BRITAIN. Agreement initialled concerning the Bagdad Railway. *Times*, June 16, 1914.

30 MEXICO. The mediation conference which met at Niagara, May 20, ended. No formal meeting was held, but a recess was taken, and in case of need the mediators will assemble elsewhere.

30 GREECE—UNITED STATES. The President signed the Navy Appropriation bill, 1914–1915, which has an amendment authorizing the sale of the American battleships Idaho and Mississippi to Greece for $12,000,000. The sale was completed by the deposit of the certified check July 8, 1914.

INTERNATIONAL CONVENTIONS

ADHESIONS, RATIFICATIONS AND DENUNCIATIONS

COLLISIONS AND SALVAGE AT SEA. Brussels, September 23, 1910.

Adhesions:

Great Britain for Newfoundland. Feb. 4, 1914. *Reichs. G.*, *1914*:88.

HAGUE CONVENTIONS. Divorce, marriage, guardianship. June 12, 1902.

Denunciation:

France. Nov. 12, 1913. ***R. gén. de dr. int. pub.***, *20*:750.

LITERARY AND ARTISTIC PROPERTY. Berne, September 9, 1886; Berlin, Nov. 8, 1908.

Adhesion:

Great Britain for Isle of Man and India. *J. O.*, *1914*:2290.

Great Britain for New Zealand. *J. O.*, *1914*:2998.

LITERARY AND ARTISTIC PROPERTY. Buenos Aires, August 11, 1910.
Ratifications:
Ecuador. *B. Rel. Ext.* (Ecuador), *1914*:712.
Honduras. *B. Rel. Ext.* (Ecuador), *1914*:715.

NATURALIZED CITIZENS. Buenos Aires, August 10, 1910.
Ratifications:
Ecuador. *B. Rel. Ext.* (Ecuador), *1914*:112.

OBSCENE PUBLICATIONS. Paris, May 4, 1910.
Adhesions:
Great Britain for India. October 1, 1913. *R. gén. de dr. int. pub.*, *21*:104.

OPIUM. The Hague, Jan. 23, 1912.
Adhesion:
Venezuela. October 28, 1913. *B. Rel. Ext.* (Venezuela), *4*:465.

PATENTS. Buenos Aires, Aug. 10, 1910.
Ratification:
Ecuador. *B. Rel. Ext.* (Ecuador), *1914*:712.

PECUNIARY CLAIMS. Buenos Aires, Aug. 10, 1910.
Ratification:
Ecuador. *B. Rel. Ext.* (Ecuador), *1914*:712.

POSTAL CONVENTION. Rome, May 26, 1906.
Ratification:
China. *Monit.*, *1914*:1864.
Spain. *Monit.*, *1914*:2809.
Venezuela. Sept. 30, 1913. *B. Rel. Ext.* (Venezuela), *4*:647.

RADIOTELEGRAPH. London, July 5, 1912.
Ratifications:
Austria-Hungary, and Bosnia-Herzegovina, March 12, 1914.
Bulgaria, April 27, 1914.
Chile, April 16, 1914.
Italy, Fritrea and Somalia, June 18, 1913.
San Marino, August 1, 1913.
Norway, October 8, 1913.
Sweden, August 8, 1913.

Accessions:

Cyrenauca, January 13, 1914.

Mexico (R), October 6, 1913.

Great Britain for Sarawak, April 23, 1914.

Tripolitana. January 13, 1914.

G. B. Treaty Series, 1914, No. 7; *Monit., 1914*:186.

Japanese ratification of July 16, 1913 included Chosen and Formosa, Japanese Somaliland, and Kwangtung; ratification of Portugal December 2, 1913, included Portuguese colonies; ratification of Spain, June 27, 1913, included Spanish colonies. *J. O., 1914*:4701.

SANITARY CONVENTION. Paris, January 26, 1912.

Signed by Germany, United States of America, Argentine Republic, Austria-Hungary, Belgium, Bolivia, Bulgaria, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Spain, France, Great Britain, Greece, Guatemala, Haiti, Honduras, Italy, Luxembourg, Mexico, Montenegro, Netherlands, Norway, Panama, Persia, Portugal, Roumania, Russia, Salvador, Servia, Siam, Sweden, Switzerland, Turkey, Egypt, Brazil, Uruguay.

Ratifications:

Netherlands, February 26, 1914.

French and Dutch texts: *Staatsblad, 1914*, No. 57.

TRADEMARKS. Buenos Aires, August 10, 1910.

Ratifications:

Ecuador. *B. Rel. Ext.* (Ecuador), *1914*:712.

WHITE SLAVERY. Paris, May 4, 1910.

Adhesions:

Great Britain for Papua and Norfolk Island and Australia. *Reichs G., 1914*:105.

KATHRYN SELLERS.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN [1]

Aliens Act, 1905. Annual report of H. M. Inspector and statement with regard to the expulsion of aliens for 1913. *Cd.* 7345. 9½d.

Arbitration treaty with Italy, signed at Rome, February 1, 1904, Exchange of notes renewing for a further period of five years. London, January 31, 1914. *Treaty series, 1914, No. 4.* Id.

Arbitration treaty with Spain signed at London, February 27, 1904, Exchange of notes renewing for a further period of five years. London, February 15, 1914. *Treaty series, 1914, No. 3.* 1d.

British nationality and status of aliens. Bill to consolidate and amend the enactments relating to. *Sess. 1914. H. L. No. 24, H. C. No. 169,* each 2½d.

Colombia. Translation of the new Colombian customs tariff law, with comparison of new and former rates of duty. *Cd. 7351.* 7½d.

Commercial travellers. Memorandum summarizing the regulations in force in British India, British self-governing Dominions, Crown Colonies and Protectorates, and foreign countries with regard to British commercial travellers. *Cd. 7031.* 11½d.

Copyright, International. Order in Council, Feb. 9, 1914, amending the Order in Council, June 24, 1912, regulating copyright relations with the foreign countries of the Berne Copyright Union as regards Italy. *Statutory Rules and Orders, 1914, No. 223.* 1½d.

Copyright, International. Order in Council, March 30, 1914, varying Order in Council, Feb. 9, 1914, regulating copyright relations as regards Italy. *Statutory Rules and Orders, 1914, No. 521.* 1½d.

Dominions. Correspondence relating to the representation of the self-governing Dominions on the Committee of Imperial Defense and to a proposed naval conference. *Cd. 7347.* 2½d.

Fleets of Great Britain, France, Russia, Germany, Italy, Austria-Hungary, United States of America, and Japan, distinguishing the

[1] Official publications of Great Britain and many of the British colonies may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C. London, England.

classes of vessels built and building, with date of launch, displacement, armaments, etc., January 1, 1914. *H. C. Paper, No. 113, 1914.* 9½d.

German Imperial and State Nationality Law, July 22, 1913, and memorandum thereon. *Cd. 7277.* 2d.

India, British East. Return of wars and military operations on or beyond the borders of British India, in which the Government of India has been engaged since 1908, showing causes, results obtained, numbers of troops employed, cost, etc. *H. C. Rept. 1914, No. 184.*

International Conference on Safety of Life at Sea. Text of the convention signed at London, January 20, 1914. (With translation) *Cd. 7246.* 1s. 9d.

International Opium Conference, Second, held at The Hague, July, 1913, Correspondence respecting the. *Cd. 7276.* 3½ d.

Panama Canal Tonnage Measurement, Rules for. Proclamation by the President of the United States. *Cd. 7305.* 3½d.

Parcel post agreement between the United Kingdom and France, signed at Paris, November 22, 1913. *Treaty series, 1914, No. 2.* 3½d.

Peace Conference, Second Hague. Bill to make such amendments in the law with respect to international tribunals, neutrality, and other matters as are necessary to enable certain conventions of the Second Peace Conference to be carried into effect. *H. C. Bill, No. 162, 1914.* 2d.

Persia. Further correspondence respecting the affairs of. (February to October, 1913.) *Cd. 7280.* 1s. 10d.

Portuguese West Africa. Further correspondence respecting contract labor in (January to December, 1913.) *Cd. 7279.* 1s.

Rhodesia, Southern. Correspondence relating to the Constitution of. (October, 1910, to April, 1914.) *Cd. 7254.* 3d.

Slavery, peonage and forced labor. Bill to consolidate and amend enactments relating to the slave trade, and to make further and better provision with respect to slavery, peonage and forced labor, and to certain companies. *H. C. Bill, No. 134, 1914.* 4d.

Spain and England. Letters, despatches, and state papers relating to the negotiations between. Preserved in the archives at Vienna, Brussels, Simancas, and elsewhere. Vol. X. Edward VI. 1550–1552. 15s. 6d.

Union of South Africa. Report of the Indian Enquiry Commission. *Cd. 7265.* 5d.

Union of South Africa. Text of the Indemnity and Undesirables Special Deportation Bill. *Cd. 7213.* 1d.

UNITED STATES [2]

American seamen in merchant marine of United States. Hearings on S. 136 to promote welfare of, to abolish arrest and imprisonment as penalty for desertion and to secure abrogation of treaty provisions in relation thereto, and to promote safety at sea. Feb. 24–March 13, 1914. 3 pts. iv + 587 p. *Merchant Marine and Fisheries Committee.*

Arbitration convention between United States and Great Britain, signed April 4, 1908, Agreement extending duration of. Signed at Washington, May 31, 1913. 4 p. *Treaty series, 587. State Dept.*

Arbitration convention between United States and Spain, signed April 20, 1908, Agreement extending duration of. Signed at Washington, May 29, 1913. 4 p. *Treaty series, 586.* (English and Spanish.) *State Dept.*

Arbitration convention between United States and Sweden signed at Washington, May 2, 1908, Agreement extending duration of. Signed Washington, June 28, 1913. 4 p. (English and French.) *Treaty series, 585. State Dept.*

Canada-United States fisheries. Hearings on H. 13005, Feb. 20, 1914, 39 p.; Feb. 26, 1914, 19 p.; March 7 and 13, 1914, 24 p. *Foreign Affairs Committee.*

———. Report amending H. 13005, to give effect to treaty between United States and Great Britain concerning fisheries in waters contiguous to United States and Canada, signed Washington, April 1 [11], 1908. Feb. 27, 1914. 4 p. *H. rp. 312. Foreign Affairs Committee.*

———. Report favoring S. 4437 to give effect to treaty between United States and Great Britain concerning, signed at Washington, April 1 [11], 1908. Feb. 26, 1914. 2 p. *S. rp. 290. Foreign Relations Committee.*

Canal Zone, Isthmus of Panama. Executive order relating to Canal Zone judiciary. March 12, 1914. 2 p. *No. 1892. State Dept.*

Chinese, Treaty, laws and rules governing admission of; rules approved Jan. 24, 1914. 73 p. Paper, 5c. *Immigration Bureau.*

Claims. References to acts authorizing payment for property lost, captured, or destroyed by enemy while in military service, etc., decisions of Supreme Court and Court of Claims on assignment of claims against United States, and veto messages of James K. Polk, Franklin

[2] When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Pierce and Grover Cleveland of French Spoliation Claims, 1914. 38 p. *War Claims Committee.*

Colon fire claims. Communication with accompanying papers, being copies of all correspondence between Department of State and Government of Panama in regard to settlement of Colon fire claims, by arbitration or otherwise, since publication of S. doc. 264, pts. 1 and 2, 57th Congress, 1st session, and S. doc. 199, 58th Congress, 2d session, on same subject. Feb. 4, 1914. 115 p. *S. doc. 405. State Dept.*

Copyright. H. 9897 to amend act to amend and consolidate acts respecting copyright, so as to require that one copy of best edition of work shall be deposited with Register of Copyrights when author of work is citizen or subject of foreign state or nation and such work has been published in foreign country. March 28, 1914. 1 p. *Pub. No. 78.* 5c.

Copyright law of United States in force July 1, 1909, as amended by acts of Aug. 24, 1912, March 2, 1913, and March 28, 1914; with rules of practice and procedure under sec. 25, by Supreme Court. Edition of March, 1914. 52 p. *Bulletin 14. Copyright Office.* Paper, 10c.

Dairy Congress, Sixth International. Message relative to acceptance by United States of invitation from Government of Switzerland to send delegates to, to be held at Berne, June 8–10, 1914, with accompanying papers. Feb. 2, 1914. 6 p. *S. doc. 400.* Paper, 5c.

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Extradition treaty between United States and Paraguay, signed Asuncion, March 26, 1913. 12 p. *Treaty series, 485.* (English and Spanish.) *State Dept.*

Hawaii. Report amending S. 1759 to reimburse certain fire insurance companies amounts paid by them for property destroyed in suppressing bubonic plague in Hawaii in 1899 and 1900. 7 p. *S. rp. 208. Senate Claims Committee.*

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———. Letter transmitting comments, data, and suggestions on H. 6060 to regulate immigration of aliens to and residence of aliens in United States. Feb. 2, 1914. 17 p. *H. doc. 689.* Paper, 5c. *Labor Dept.*

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———. Report amending H. 6060 to regulate immigration of aliens to and residence of aliens in United States. March 19, 1914. 16 p. *S. rp. 355. Foreign Relations Committee.*

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———. Memorial of seamen of United States praying for disapproval by Senate of, and for enactment by Congress of S. 136. 22 p. *S. doc. 452.* Paper, 5c.

International Exposition of Sea Fishery Industries at Boulogne-sur-Mer, France, June 15–October 1, 1914, Communication in regard to invitation from French Republic to United States to participate in. April 10, 1914. 2 p. *H. doc. 894. State Dept.*

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Mexico. Address of President of United States, delivered at joint session of two Houses of Congress, April 20, 1914, on situation in our dealings with Victoriano Huerta. *H. doc. 910.* 5 p. Paper, 5c.

———. Message recommending appropriation for purpose of providing means to bring to their homes in United States American citizens now in Mexico. April 22, 1914. 1 p. *H. doc. 916. State Dept.*

———. Exportation of arms or munitions of war to. Proclamation revoking proclamation of March 14, 1912. Feb. 3, 1914. 1 p. *No. 1263. State Dept.*

———. H. J. R. 251, justifying employment by President of armed

forces to enforce his demand for unequivocal amends for affronts and indignities committed against United States in Mexico. April 22, 1914. 1 p. *Pub. No. 22.* 5c.

Naturalization, Annual report of Commissioner of, fiscal year 1913. 36 p. *Naturalization Bureau.*

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Opium and cocaine, importation of opium and preparations and derivatives thereof and exportation of opium or cocaine or salts, derivatives, or preparations thereof, under act approved Jan. 17, 1914. 6 p. *Treasury Decision, 34221. Treasury Dept.*

Panama Canal. Canal treaties, executive documents presented to Senate with proceedings by Senate thereon. 1914. 84 p. *S. doc. 456.* Paper, 10c.

———. Hearings before Committee on Interoceanic Canals, 62d Congress, on S. 8114, to prevent discrimination in Panama Canal tolls. Statement of Elihu Root. Feb. 12, 1913. 23 p. *S. doc. 450.* Paper, 5c.

———. Executive order establishing regulations relative to payment of tolls and of bills for materials, supplies, repairs, harbor pilotage, towage, and other services, furnished to vessels by Panama Canal. April 16, 1914. 3 p. *No. 1917. State Dept.*

———. Executive order, providing conditions of employment for permanent force for. Feb. 2, 1914. 5 p. *No. 1888. State Dept.*

———. Executive order providing method for determination and adjustment of all claims arising out of personal injuries to employees engaged in actual work on Panama Canal or Panama Railroad, and prescribing schedule of compensation therefor. March 20, 1914. 11 p. *No. 1902. State Dept.*

———. Executive order to establish Washington Office of Panama Canal, to provide temporarily for organization, officials and employees thereof, and to continue in force for Panama Canal rules, regulations and Executive orders which may have been made for Isthmian Canal Commission. March 2, 1914. 3 p. *No. 1897. State Dept.*

———. Strategic value of. By J. S. McKean. 1914. 8 p. 2 maps. Paper, 15c. *Naval War College.*

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———. Report favoring H. 1922 to amend, so as to repeal that part of the act which exempts vessels engaged in coastwise trade from tolls. March 6, 1914. 14 p. *H. rp. 343.* Paper, 5c. *Interstate and Foreign Commerce Committee.*

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Panama Canal and our relations with Colombia. Papers relating to acquisition of Canal Zone, including extract from message of President Roosevelt, Dec. 7, 1903, and message relating to Isthmian Canal, Jan. 4, 1904, address by Elihu Root before Union League Club on ethics of Panama question, editorial from Outlook of Oct. 7, 1911, on how United States acquired right to dig Panama Canal, letter of Mr. Hay, Secretary of State, to Gen. Rafael Reyes, dated Jan. 5, 1904, and extract from autobiography of Mr. Roosevelt. April 23, 1914. 75 p. *S. doc. 471.* Paper, 5c.

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GEO. A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

AMERICAN AND BRITISH CLAIMS ARBITRATION TRIBUNAL

AWARD IN THE MATTER OF THE EASTRY

CLAIM NO. 3

[Arbitrators: M. Henri Fromageot, Sir Charles Fitzpatrick, Hon. Chandler P. Anderson]

Decision rendered May 1, 1914

This is a claim presented by His Britannic Majesty's Government on behalf of Messrs. Sivewright, Bacon and Co., of Manchester, England, against the Government of the United States for the sum of eight hundred forty-nine pounds eight shillings nine pence (£849/8/9) with interest at four per cent (4%) for nine and a half years, *i. e.*, from December 9, 1902, the date on which His Majesty's Government first brought the claim to the notice of the United States Government, to April 26, 1912, the date of the confirmation of the first schedule of the Pecuniary Claims Convention, viz., three hundred twenty-three pounds (£323), making a total of one thousand one hundred and seventy-two pounds, eight shillings, nine pence (£1,172/8/9).

By the certificate of registry, produced at the request of this Tribunal, it appears that the steamship *Eastry*, belonging to Messrs. Sivewright, Bacon and Co., was in June, 1901, a British ship.

It is admitted by both parties that, at that date, the *Eastry* was under time charter to one Simmons by whom she had been sublet to the Compania Maritima, a company then under contract with the United States Government to carry a cargo of coal to be delivered at Manila Bay.

It appears by the logbook of the *Eastry*, and it is not contested, that she arrived and anchored at Cavite, Manila Bay, on June 7, 1901, and that, on the same and following days, *i. e.*, on June 7, 8, 13 and 15, she was damaged by certain coal hulks that came alongside to take off her

cargo It is admitted that the hulks belonged to the United States Government (British memorial, annex 8).

By a letter dated June 17, 1901 (British memorial, annex 8), a major and quartermaster, United States Army, in charge of the Army Transport Service, Manila, reported to the Chief Quartermaster, Division of Manila, that after inspecting the damage done the *Eastry* by the coal hulks, the superintending engineer of his office estimated the cost of necessary repairs at four thousand five hundred dollars ($4,500) and the time required to complete these repairs at twenty working days, which at two hundred twenty-five dollars ($225) per day demurrage would make the total cost nine thousand dollars ($9,000).

He stated further that the ship's master had informed the superintending engineer that he, the master, estimated the cost of repairs, including demurrage, at one thousand three hundred pounds (£1,300), *i. e.*, six thousand five hundred dollars ($6,500).

In his request for instructions, the quartermaster said:

> It would therefore appear that it will be to the advantage of the United States Government if the amount of damages as fixed by Captain Carr (the ship's master) could be paid.

The Chief Quartermaster forwarded this letter to the Adjutant General of the Division on June 18, 1901, with an endorsement recommending approval of the expenditure of six thousand five hundred dollars ($6,500), considering that to make the repairs and pay the demurrage "will cost considerably more than $6,500, the amount the owners are willing to take in final settlement."

By another endorsement dated June 19, 1901, *ibid.*, the Assistant Adjutant General expressly approved the recommendation of the Chief Quartermaster.

On June 24, 1901, the ship's master wrote to the Superintendent of the United States Army Transport Service submitting a claim for damages sustained by the *Eastry*, which he estimated at one thousand three hundred pounds (£1,300), and he requested payment of this amount. This request was made in consequence of the decision reached by the officers of the Army Transport Service as appears from the endorsements of July 17th and July 24th on that letter, that it would be advisable not to make the final repairs then, but to place the ship, by way of temporary repairs, in such a condition that she could be given a certificate of seaworthiness, leaving the owners to file a claim for such damages as had not

been repaired. The reason given in these endorsements for adopting this course was that additional damages would be claimed because of the delay involved in making all the repairs, and also because of the consequent loss of another charter party which the ship then had.

It is shown by the said endorsement of July 17, 1901, that after a new survey and estimate at the request of the United States authorities, temporary repairs were made at the expense of the United States Government, which repairs were finished on June 24, 1901, and that the United States authorities then informed the master of the *Eastry* that his ship was seaworthy, and a certificate to this effect was furnished him. He was further informed in reply to his letter of June 24th that all claims against the United States Government are adjusted by the War Department in Washington, and that his letter with all papers pertaining to the case would be forwarded with a statement of the matter, recommending that the claim be adjusted as early as practicable (British memorial, annex 9).

In August, September, October, 1901, and May, 1902 (British memorial, annexes 11, 12, 13, 14 and 15), some correspondence took place between the owners of the *Eastry* and the United States authorities with reference to the offer made by the owners to accept the payment of one thousand three hundred pounds (£1,300) in settlement, in reply to which offer the owners were informed that "there were no funds under the control of the War Department from which claims for damages can be paid, and that Congress alone can grant relief in such cases" (British memorial, annex 15).

On July 11, 1902 (British memorial, annexes 16, 17, 18 and 20), the *Eastry* being in Liverpool, England, the representatives of the owners notified by telegrams and letters both the United States authorities in Washington and the American Embassy in London, that a survey of the ship was to be made and they advertised the fact in the newspapers, so that the United States Government might have full opportunity to be represented.

By a telegram dated at Washington, July 11, 1902 (British memorial, annex 19), the United States authorities notified the owners that the ship having been surveyed in Manila, it was not practicable for their government to be represented by surveyors at Liverpool.

On July 14, 1902, the survey was made in the absence of any representatives of the United States Government and immediately thereafter the repairs were proceeded with.

The United States Government contends before this Tribunal that it is not liable in damages for the injuries and losses suffered by the *Eastry* because they were due to rough seas, and because the captain alone had authority to determine the time and manner of discharging the cargo. It is further alleged that the captain of the steamer was negligent in that he allowed the work of discharging the cargo to be proceeded with under the circumstances.

This was not the view taken by the United States military authorities who had control of this case at the time the damages occurred, and who were familiar with all the circumstances. In an endorsement on the records of the case made by the Chief Quartermaster at Manila dated June 18, 1901, within a week after the injuries occurred, he stated "the damages were clearly the fault of the Government, and that there is no question as to the Government's responsibility," etc. (British memorial, annex 8). So also the major and quartermaster in charge of the Army Transport Service at Manila, stated in a further endorsement, dated July 17, 1901, that "it is thought that the repairs should be made at the expense of the United States Government."

It does not appear from the documents, and there is no evidence, that the captain was ever consulted or asked to agree to the method adopted by the United States authorities in making the temporary repairs. He was merely informed of what had been done.

The United States Government contends before this Tribunal that the temporary repairs at Manila were made as an act of grace. But this contention finds no support either in the documentary or other evidence. All the evidence goes to show that the United States authorities throughout sought to make the most advantageous arrangement for their government, and the course adopted by the United States authorities, both at the time the injuries occurred, and in making the preliminary repairs, is wholly inconsistent with the contention now made that the United States was not liable for the damages inflicted.

It must be especially noted that, before this claim was submitted to this Tribunal, the United States Government never, either at Manila or afterwards when it was notified of the survey and repairs at Liverpool, or later in the course of the diplomatic correspondence relating to the presentation of the claim, contested its obligation to pay for the repairs.

In view of all the evidence presented in the record and for the reasons above stated, the Tribunal is of the opinion that the United States Gov-

ernment is liable to pay for the damages, which form the basis of this claim.

As to the amount of the claim.

The United States Government contends that the fact that the *Eastry* was not dry docked at Liverpool for more than a year after the injuries were suffered by the vessel at Manila, imposed a burden upon His Majesty's Government to prove that the dry-docking was necessitated solely for the purpose of repairing such injuries. It is not disputed that to make the repairs required as the result of the occurrences at Manila, nine days were taken in the dry dock. For that period of time the owners of the vessel were deprived of her use by reason of the said occurrences and they are entitled to compensation therefor, and four pence (4d) per gross registered ton per day is the amount claimed for demurrage for the loss of the owners on that account, which is the rate at which demurrage is computed at the place where the detention occurred.

It has been shown that the United States had full opportunity to discuss the nature and amount of the repairs and all matters connected therewith when notified of the survey at Liverpool.

Here, again, it is to be noted that from the time the claim was first transmitted to the United States Government, no objection whatever has been made either to the amount of the claim or to the obligation to pay it. On the contrary, it appears from the Congressional public documents that the claim has always been recommended for payment either by the United States War Department, the Secretary of State, or the President, and favorably reported to Congress.

As to interest.

This claim was presented to the United States Government by the British Ambassador at Washington on December 9, 1902. There is no evidence to explain why a claim so frequently recommended and so favorably reported on by the United States authorities was not paid.

By clause No. 4 of the Terms of Submission, annexed to Schedule 1 of the Special Agreement, this Tribunal is authorized to allow interest at four per cent (4%) per annum for the whole or any part of the period between the date when the claim was first brought to the notice of the other party and the date of the confirmation of the first schedule. Taking into consideration the circumstances above mentioned, the Tribunal thinks it is equitable to allow interest in the present case.

On these motives

The Tribunal decides that in this case the United States Government shall pay to His Britannic Majesty's Government the sum of eight hundred forty-nine pounds eight shillings nine pence (£849/8/9) with interest at four per cent (4%) from December 9, 1902, to April 26, 1912.

The President of the Tribunal,
HENRI FROMAGEOT.

Washington, *May 1, 1914.*

AWARD IN THE MATTER OF THE FREDERICK GERRING, JR.

CLAIM NO. 10

Decision rendered May 1, 1914

The Tribunal considering that an amicable settlement of this case has been arrived at by the governments concerned, according to which the Canadian Government is disposed to place at the disposal of the United States Government a sum of nine thousand dollars ($9,000), to be employed in blotting out the recollection by the American citizen affected of an incident, which, on its side, the Government of the United States will regard henceforth as finally and from every point of view closed and settled,

Decides that the said settlement shall be put on the record of this Tribunal, and shall be complied with by the governments in conformity therewith.

The President of the Tribunal,
HENRI FROMAGEOT.

Washington, *May 1, 1914.*

AWARD IN THE MATTER OF THE CANADIENNE

CLAIM NO. 16

Decision rendered May 1, 1914

This is a claim presented by His Britannic Majesty's Government for seven thousand eight hundred sixty-five 59/100 dollars ($7,865.59), for damage to the Canadian Government's steamship *Canadienne* and loss to her charterer, the late Robert Lindsay, and his representatives, all of

them British subjects, resulting from a collision which occurred in the River St. Lawrence between the steamship *Canadienne* and the United States Government's steamship *Yantic* on October 29, 1897.

The collision was the subject of two investigations, one made by the Canadian marine authorities at Montreal on November 3 and 8, 1897, and the other by the United States naval authorities on November 22, 1897, at Quebec.

I. As to the facts:

The *Canadienne* left Montreal on October 27, 1897, bound for Quebec, Gaspé and other ports on the lower St. Lawrence. She was fully manned and had an apprentice pilot on board. In the early morning of October 29th she was on her way down nearing Pointe à Pizeau or Sillery Point, on the north bank of the river, about three miles above Quebec.

On the same morning the United States steamship *Yantic* left her Quebec anchorage at 4.15 a. m. bound for Montreal and at 4.30 she stood up the river with a duly licensed Canadian pilot on board.

It appears from the evidence taken at the investigation held by the Canadian authorities that the *Canadienne*, when approaching Sillery Point, first saw both side lights of another steamer, which subsequently proved to be the *Yantic*, and shortly thereafter, only her green light, afterwards, both side lights appeared again, and then the green light disappeared, leaving only the red light visible.

It appears from the inquiry held by the United States authorities that the *Yantic* came up to and passed Sillery Point without reporting any light ahead; then she changed her course slightly to starboard, and after the ship was steadied on that new course, she reported the masthead and the green light of an approaching steamer, which was the *Canadienne*.

It was found in the United States inquiry, that "When the *Canadienne* saw both the *Yantic's* side lights and afterwards the green only, the latter must have been east of Pizeau Point" (United States answer, p. 29).

It is further stated in the report of the same inquiry that it is probable that the change of course made by the *Yantic* in rounding Sillery Point opened again her two lights and let the green disappear, leaving only the red visible.

After the green light of the *Canadienne* was reported, the *Yantic* finding herself red to green, came one-half point to starboard, and gave one blast of the whistle to indicate that she was directing her course to starboard.

To this signal the *Canadienne* gave no answer, but kept steadily on her course.

Then the *Yantic* put her helm hard-a-port, reduced her speed, stopped and reversed the engines.

The *Canadienne* continued on her way, full speed ahead.

Almost immediately the collision occurred.

II. As to the liability:

At the outset it must be observed that the International Rules of the Road applied in 1897 on the St. Lawrence River between Montreal and Quebec.

When the *Canadienne* saw both side lights of the *Yantic*, and particularly when almost immediately afterwards the *Yantic* showed her red light,—a clear indication that she was coming to starboard—the *Canadienne* was at fault in taking or keeping her way to cross the *Yantic's* bow so as to pass starboard to starboard, instead of giving way so as to pass port to port according to the Rules of the Road (Articles 25 and 18, pars. 1 and 3). There is no evidence in this record showing the existence of any necessity, local conditions, or special rule which would authorize the *Canadienne* to keep the north side of the river (Rules of the Road, Article 30). Furthermore the *Canadienne* was about to round a point in the river and when she saw another steamer rounding the same point in the opposite direction, she was at fault in not indicating her course by sounding her whistle (Rules of the Road, Article 28, par. 2).

On the other hand, it is stated in the United States inquiry that the *Yantic*, before reporting the masthead and green light of the *Canadienne*, that is to say, before or when she was rounding Sillery Point, was within sight of and should have reported the lights of the *Canadienne*. The United States officer appointed to make the inquiry said: "As the lights were plainly visible, they should have been seen before" (United States answer, p. 28), and, in fact, at that time the *Yantic* had already been sighted by the *Canadienne*. Nevertheless those on board the *Yantic* failed to report the *Canadienne's* lights until after their ship had taken her course to starboard, and it necessarily follows that the *Yantic* did not keep a proper lookout (Rules of the Road, Article 29). The same officer also stated that as he had been unable to examine the lookout he could not give any explanation as to why the lights of the *Canadienne* had not been reported.

Whatever may be the reason, right or wrong, why the *Canadienne*

took or kept her way toward the north side of the river and was still showing her green light, the failure of the *Yantic* to keep a proper lookout prevented her from seeing the *Canadienne* until they were so close that it was dangerous to try to cross her bow and the *Yantic* should have kept clear of a way in which she was able to see the other steamer was already engaged (Rules of the Road, Articles 27 and 29).

The *Canadienne* acted most negligently, after taking or keeping her port way as aforesaid, (a) in giving no blast signal and no answer to the starboard blast of the *Yantic*, (b) in not reducing her speed, (c) in not stopping and reversing as she was approaching nearer and nearer the *Yantic*. And when the collision appeared to be inevitable, she did not take any of the measures prescribed by the Rules of the Road as well as by the most elementary prudence to avert the accident.

Consequently, so far as it is possible to ascertain the facts of a collision after fifteen years have elapsed, and without an opportunity to see the witnesses, the ship's papers, or the engineer's log, the Tribunal is of opinion that the *Canadienne* was at fault, but that the *Yantic* was not without reproach, and consequently that both ships are to blame, but in a different proportion.

III. As to the law and the consequences of the liability:

According to the generally recognized rule of international law in the United States (Story, Conflict of Laws, ch. 14, sec. 558) and in Great Britain (Marsden, Collisions at Sea, 6th ed., p. 198), in such a case as this the ***lex loci delicti commissi*** must apply.

The law in force in that respect in Canada in 1897 was the law in force in England (Canada Shipping Act, Rev. St. 1906, ch. 113, sec. 918), and at that time the English rule as reported in Marsden, Collisions at Sea, 6th ed., p. 123, was as follows:

> The law apportions the loss where both ships are in fault by obliging each wrongdoer to pay half the loss of the other. Thus, if the loss on ship A is £1,000 and that on B is £2,000 A can recover £500 against B, and B can recover £1,000 against A.

IV. As to the amount of the claim:

His Britannic Majesty's Government give an estimate of four thousand three hundred eight 77/100 dollars ($4,308.77) net for the disbursements of the Dominion of Canada for repairs to the *Canadienne*, dock dues and incidental expenses, and the charterer an estimate of three thousand five hundred fifty-six 82/100 dollars ($3,556.82) net, mak-

ing the total of seven thousand eight hundred sixty-five 59/100 dollars ($7,865.59) as claimed.

But some of the items in the charterer's estimate represent damages, of which no sufficient proof is given, viz., loss of traffic, two thousand two hundred fifty dollars ($2,250), witnesses and fees of counsel, five hundred dollars ($500), and traveling expenses, two hundred forty-eight dollars ($248), amounting to two thousand nine hundred and ninety-eight dollars ($2,998), reducing the total amount to four thousand eight hundred sixty-seven 59/100 dollars ($4,867.59), one-half of which is two thousand four hundred thirty-three 79/100 dollars ($2,433.79).

Although the United States did not claim for damages suffered by the *Yantic*, inasmuch as according to the law applicable to this case, each vessel is entitled to recover one-half of her own damage, the *Yantic's* damage, which has been estimated by the United States naval commissioner at one thousand dollars ($1,000) (United States answer, p. 33), must be taken into consideration.

V. As to the interest:

The Tribunal, being entitled under the Terms of Submission to allow or disallow interest as it thinks equitable, is of the opinion that in this case no allowance of interest is justified.

On these motives

The Tribunal decides that in this case the Government of the United States shall pay the Government of His Britannic Majesty the sum of one thousand nine hundred thirty-three 79/100 dollars ($1,933.79) without interest.

The President of the Tribunal,

Washington, *May 1, 1914.* HENRI FROMAGEOT.

AWARD IN THE MATTER OF THE LORD NELSON

CLAIM NO. 20

Decision rendered May 1, 1914

This is a claim for Five thousand dollars ($5,000) and interest from June 5, 1812, presented by His Britannic Majesty's Government on behalf of Henry James Bethune, legal personal representative of James and William Crooks, deceased, the owners of the *Lord Nelson*, a British

schooner, on account of the capture of the said schooner by the United States naval authorities on June 5, 1812, nearly two weeks before the declaration of war between Great Britain and the United States of America.

The capture of this schooner at the date and under the circumstances above mentioned is not disputed.

Further, it appears that the vessel, after her capture, was acquired by the United States Navy at a valuation of two thousand nine hundred ninety-nine 25/100 dollars ($2,999.25). She was converted into a war vessel by the United States and used against Great Britain in the war of 1812 and was never returned to her former owners.

It is said that in 1815 the owners applied to the United States Government for redress, but no evidence is offered to show either the date of that application or whether it constituted a claim regularly presented.

On July 11, 1817, by decree of the court of the Northern District of New York, the capture of the *Lord Nelson* was pronounced to be illegal and void and the proceeds of the sale, *i. e.*, two thousand nine hundred and ninety-nine 25/100 dollars ($2,999.25) were directed to be paid to the owners; but that direction was not complied with because the funds had meanwhile been embezzled by the clerk of the court.

On February 3, 1819, a regular claim for indemnity was received by the United States Government from the British Government, and subsequently numerous claims, petitions and applications were presented either by the claimants or by His Britannic Majesty's Government, but no action was taken notwithstanding favorable reports and recommendations on bills introduced in Congress providing for payment of the claim.

On June 24, 1836, on a new petition presented by the claimants, the Committee on Claims of the House of Representatives, considering that the illegality of the capture was established by the said decree of 1817, resolved that an investigation should be made by the Secretary of the Navy, as to the real value of the ship at the time of the capture. And on February 11, 1837, the Secretary of the Navy, after an investigation by a special committee, reported that this value should be fixed at five thousand dollars ($5,000).

This estimate has never been questioned on any of the many occasions when this claim has been under consideration by executive or congressional committees, and the United States Government has admitted before this Tribunal its liability on this claim to the extent of the

principal, to wit: five thousand dollars ($5,000) (United States answer, p. 1).

The only question remaining for decision by this Tribunal is whether or not interest upon the principal should be awarded, and, if so, for what period and at what rate.

On this point it should be observed that from the beginning this claim has never been presented to nor considered by the United States Government as a claim for the payment of a liquidated and ascertained sum of money, but as a claim for indemnity and redress because the United States Government wrongfully took possession of and used the vessel belonging to the claimant. That plainly appears as well from the application made as aforesaid in 1819 by His Britannic Majesty's Government, as from the valuation made by the United States Government in 1837, and from the admission that the valuation of five thousand dollars ($5,000) was the real value of the vessel at the time of the capture.

In international law, and according to a generally recognized principle, in case of wrongful possession and use, the amount of indemnity awarded must represent both the value of the property taken and the value of its use (Rutherforth's Institutes, Bk. 1, ch. XVII, sec. V; VI Moore's International Law Digest, p. 1029; Indian Choctaw's Case, Law of Claims against Governments, Report 134, 43 Cong., 2nd sess. House of Representatives, Washington, 1875, p. 220, *et seq.*)

This principle applies especially when the Terms of Submission, as in this case, provide for interest and specify the *dies a quo* and the *dies ad quem* for the allowance of interest, as the Tribunal thinks equitable.

It is admitted in this case that the sum of five thousand dollars ($5,000) represents only the value of the vessel, and does not cover the use by the United States Government of the vessel or the money equivalent to its value.

Under these considerations it would have been justifiable to allow interest from the time of the capture, *i. e.*, from June 12, 1812, except that according to Section IV of the Terms of Submission annexed to the Pecuniary Claims Convention, interest is not to be allowed by this Tribunal previous to the date when the claim was first brought to the notice of the other party, and as above stated that date must be fixed as February 3, 1819.

As to the rate, it is a generally recognized rule of international law that interest is to be paid at the rate current in the place and at the time the principal was due. But in this case, by the Terms of Submission

above mentioned, the two parties have agreed that in respect of any claim interest is not to exceed four per cent. (4%) per annum, and in view of all the circumstances, the Tribunal considers that the allowance of interest at this rate is equitable.

On these motives

The Tribunal decides that the agreement given by the Government of the United States to pay to His Britannic Majesty's Government the sum of five thousand dollars ($5,000) claimed by the legal representatives of the owners of the *Lord Nelson*, shall be put on record; and further awards that the said sum shall be paid accordingly with interest at four per cent. (4%) from February 3, 1819 to April 26, 1912.

The President of the Tribunal,

Washington, *May 1, 1914.* HENRI FROMAGEOT.

AWARD IN THE MATTER OF THE GREAT NORTHWESTERN TELEGRAPH COMPANY OF CANADA

CLAIM NO. 22

Decision rendered May 1, 1914

This is a claim presented by His Britannic Majesty's Government on behalf of the Great Northwestern Telegraph Company of Canada, a British corporation, for one thousand thirty-nine 58/100 dollars ($1,039.58 as stated in their memorial, which amount was reduced on the oral argument to nine hundred thirty-nine 58/100 dollars ($939.58), together with interest from July 17, 1904, for damage caused to the telegraph cable of the said company in Quebec harbor on July 17, 1904, by the United States gunboat *Essex*, in dropping her anchor in a reserved space and fouling that cable.

Both parties agree as to the facts.

It appears from an affidavit of the superintendent of the company (British memorial, pp. 28–29) that within eight days after the cable was damaged, the damage was examined and estimated to be equal to at least one-third of the original cost of the cable, viz., six hundred seventy-nine 48/100 dollars ($679.48). It appears further that the actual cost of repairs was one hundred forty-eight 10/100 dollars ($148.10).

The claim is presented for both those items, being altogether eight hundred twenty-seven 58/100 dollars ($827.58), to which is added, as a

third item counsel fee for two hundred twelve dollars ($212), afterward reduced to one hundred twelve dollars ($112),—a total of nine hundred thirty-nine 58/100 dollars ($939.58).

The United States Government admits its liability for eight hundred twenty-seven 58/100 dollars ($827.58), but denies any liability as to counsel fees and interest.

The Tribunal cannot but remark that the estimated damage of six hundred seventy-nine 48/100 dollars ($679.48) is simply the contention of the injured party without being supported by any other evidence than its own statement and that the actual expenses for repairs, being one hundred forty-eight 10/100 dollars ($148.10) is accounted for separately.

Under these circumstances, and considering Section 4 of the Terms of Submission, the Tribunal is of opinion that the sum of eight hundred twenty-seven 58/100 dollars ($827.58) as accepted by the United States Government is sufficient compensation for any loss incurred by said damage, and in view of all the circumstances it does not consider it equitable to allow interest.

On these motives

The Tribunal decides that the agreement given by the Government of the United States to pay His Britannic Majesty's Government the sum of eight hundred twenty-seven 58/100 dollars ($827.58) claimed by the Great Northwestern Telegraph Company of Canada shall be put on record, and further awards than the said sum shall be paid accordingly without interest.

The President of the Tribunal,

Washington, *May 1, 1914.* HENRI FROMAGEOT.

AWARD IN THE MATTER OF THE CADENHEAD CASE

CLAIM NO. 37

Decision rendered May 1, 1914

His Britannic Majesty's Government present a memorial in this case "in support of the claim respecting the killing of Elizabeth Cadenhead," a British subject, who left next of kin her surviving as stated in annex 1 of the memorial, all of whom are British subjects. The amount claimed as compensation for the death of Miss Cadenhead is twenty-five thousand dollars ($25,000).

The death of Miss Cadenhead occurred under the following circumstances:

July 22, 1907, Miss Cadenhead with her brother George M. Cadenhead and Katharine Fordyce Cadenhead were at Sault Ste. Marie, a city in the State of Michigan, United States of America; it was about 3.30 p. m. and they were returning to the city from a visit to a military post named Fort Brady, the entrance of which is situated on a public highway, called South Street. They were proceeding along the sidewalk of South Street, and when at about two hundred yards from the entrance of the fort, Miss Cadenhead was hit by a rifle shot and instantly killed.

The shot was fired by a private soldier belonging to Company M of the Seventh Infantry, garrisoned at Fort Brady, and was aimed at a military prisoner, who was escaping from his custody when at work just at the entrance of the fort on South Street, by running easterly along the sidewalk on that street in the rear of the Cadenhead party.

His Britannic Majesty's Government contend that this soldier was not justified in firing upon an unarmed man on a public highway, that he acted unnecessarily, recklessly and with gross negligence, and that compensation should be paid by the Government of the United States on the ground that under the circumstances it was responsible for the act of this soldier.

The question whether or not a private soldier belonging to the United States Army and being on duty acted in violation of or in conformity with his military duty is a question of municipal law of the United States, and it has been established by the competent military court of the United States that he acted in entire conformity with the military orders and regulations, namely, Section 365 of the Manual of Guard Duty, United States Army, approved June 14, 1902.

The only question for this Tribunal to decide is whether or not, under these circumstances, the United States Government should be held liable to pay compensation for this act of its agent.

It is established by the evidence that the aforesaid orders under which this soldier, who fired at the escaping prisoner, acted, were issued pursuant to the national law of the United States for the enforcement of military discipline, and were within the competency and jurisdiction of that government.

It has not been shown that there was a denial of justice, or that there were any special circumstances or grounds of exception to the generally recognized rule of international law that a foreigner within the United

States is subject to its public law, and has no greater rights than nationals of that country.

Furthermore, no evidence is offered and no contention is made as to any personal pecuniary loss or damage resulting to the relatives or legal representatives of the unfortunate victim of the accident, and it is to be noted that this is a pecuniary claim based on alleged personal wrongs of nationals of Great Britain, as appears from its inclusion in clause III of the schedule of claims in the Pecuniary Claims Convention, under which it is presented.

Under those conditions the Tribunal is of the opinion that in the circumstances of this case no pecuniary liability attaches to the Government of the United States.

It should be said, however, that it may not have been altogether prudent for the United States authorities to permit prisoners under the charge of a single guard, to be put at work just at the entrance of a fort on a public highway in a city, and order or authorize that guard, after allowing one of these prisoners to escape under these circumstances, to fire at him, while running along that highway.

This tribunal, therefore, ventures to express the desire that the United States Government will consider favorably the payment of some compensation as an act of grace to the representatives of Miss Cadenhead, on account of the unfortunate loss of their relative, under such distressing circumstances.

On these motives

The Tribunal decides that with the above recommendation, the claim presented by His Britannic Majesty's Government in this case be disallowed.

The President of the Tribunal,

Washington, *May 1, 1914.* HENRI FROMAGEOT.

ETHEL C. MACKENZIE *v.* JOHN P. HARE ET AL.

Supreme Court of California

[S. F. No. 6465. In Bank. Filed August 5, 1913]

Application in this court for a writ commanding defendants, as members of the Board of Election Commissioners of the city and county of San Francisco, to register the plaintiff as a qualified voter of said city and county.

The plaintiff was born and ever since has resided in the State of California. On August 14, 1909, being then a resident and citizen of this State and of the United States, she was lawfully married to Gordon Mackenzie, a native and subject of the kingdom of Great Britain. He had resided in California prior to that time, still resides here and it is his intention to make this State his permanent residence. He has not become naturalized as a citizen of the United States and it does not appear that he intends to do so. Ever since their marriage the plaintiff and her husband have lived together as husband and wife. On January 22, 1913, she applied to the defendants to be registered as a voter. She was then over the age of twenty-one years and had resided in San Francisco for more than ninety days.

Registration was refused to her on the ground that by reason of her marriage to Gordon Mackenzie, a subject of Great Britain, she thereupon took the nationality of her husband and ceased to be a citizen of the United States. The soundness of this objection is the question to be decided.

The qualifications necessary to entitle a person to the privilege of suffrage and the right of registration as a voter in this State are fixed, declared and controlled by section 1 of Article II of the State Constitution as amended on October 10, 1911. The purpose of the amendment was to extend the privilege of suffrage to women. The portion of the section upon which the decision of this case depends is the opening clause, giving the privilege of suffrage to "every native citizen of the United States," who possesses the other qualifications mentioned in the subsequent parts of the section. It declares that persons having the qualifications stated shall "be entitled to vote at all elections." As it is admitted that the plaintiff possesses all the other qualifications required, the sole question presented is whether or not, upon the facts we have stated, she is a "native citizen of the United States." If she comes within that definition she is entitle to registration as demanded.

She was a citizen of the United States prior to her marriage to Mackenzie. No event affecting her status as a citizen, except said marriage, has occurred since that time. She therefore still remains a citizen of the United States unless she has lost her citizenship by her marriage with an unnaturalized resident alien. (Hauenstein *v.* Lynham, 100 U. S. 484.)

The status of persons as citizens or aliens, respectively, is controlled entirely by the Constitution of the United States and the Acts of Congress passed in pursuance thereof. We must look solely to them to

ascertain whether or not the plaintiff is a citizen and as such a voter entitled to registration. And in determining their meaning and effect the State courts are bound by the interpretation put upon them by the courts of the United States.

Prior to any legislation on the subject by Congress there was some uncertainty and conflict of authority concerning the right of expatriation. The question first arose in 1795, in Talbot *v.* Jansen, 3 U. S. (Dall.) 133, 162, where Iredell, J., discusses it at length, stating his conclusion to be that a citizen could not denationalize himself without the consent of his government. The other justices expressed no opinion on the point. Similar views were stated in Shanks *v.* Dupont (1830), 3 Peters, 246; Inglis *v.* Sailors Snug Harbour (1830), 3 Peters, 101, 125, and in United States *v.* Gillies (1815), Peters C. C. 161. In Shanks *v.* Dupont, the court said, per Story, J.: "The general doctrine is, that no persons can, by any act of their own, without the consent of their government, put off their allegiance, and become aliens." And on this ground it was held that the marriage of a woman citizen with an alien did not change her allegiance to the United States. There was, at that time, no legislation permitting expatriation. In Stoughton *v.* Taylor, 2 Paine C. C. 661, it is said that the right of expatriation is fundamental and inherent. To the same effect see Alsberry *v.* Hawkins, 39 Ky. 178. Other State courts were of the same opinion. The denial of the right of voluntary expatriation was somewhat inconsistent with the laws of the United States providing for the naturalization of foreigners, the first of which was enacted in 1779 (1 U. S. Stats. 103). The question was practically set at rest by the Act of July 26, 1868 (15 U. S. Stats. 223; U. S. Rev. Stats., sec. 1899). The preamble thereof declares that the right of expatriation is a natural and inherent right of all people. The body of the Act declares further that any decision of any officer of the government denying, restricting, or impairing the right of expatriation is "inconsistent with the fundamental principles of this government." This language seems to be but little more than a legislative declaration of national policy. But it clearly is operative in this, that it gives the consent of the national government to the expatriation of any citizen by his or her voluntary act. If such consent of the nation is essential to a valid expatriation, this law is evidence thereof. The absolute right of expatriation is now recognized as the settled doctrine of this country. (Browne *v.* Dexter, 66 Cal. 40; Kane *v.* McCarthy, 63 N. Car. 302; Burton *v.* Burton [N. Y.], 1 Keyes, 359; 1 Abb. Dec. 271; Kelly *v.* Owen,

74 U. S. 496; In re Look Tin Sing, 21 Fed. 905.) In the case last cited the court says: "The United States recognize the right of every one to expatriate himself and choose another country." In view of the contention to be hereafter mentioned, it is to be noticed that this case was decided after the adoption of the Fourteenth Amendment.

The first legislation by Congress in regard to the status of married women as citizens was the Act of 1855. (10 U. S. Stats. 604; U. S. Rev. Stats. 1994). Section 2 is as follows: "That any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen." In the Revised Statutes the words "and taken" are omitted. The effect of this statute is that every alien woman who marries a citizen of the United States becomes perforce a citizen herself, without the formality of naturalization and regardless of her wish in that respect. (Kane *v.* McCarthy, supra; Kelly *v.* Owen, supra.) It is not entirely certain that, under our State Constitution, such citizenship would entitle such foreign-born woman to vote. Our Constitution confers that privilege only on three classes of persons: first, native citizens; second, those who became citizens under the Treaty of Queretaro, or, as it is commonly called, the Treaty of Guadalupe-Hidalgo; and, third, naturalized citizens. An alien woman who marries a citizen thereby herself becomes a citizen, but there may be doubt if she thereby becomes a naturalized citizen within the meaning of the Constitution. This is, of course, a question not here involved. We mention it only to call attention to the distinction and to make it clear that we have not decided it.

The Act of 1855 determines the citizenship of an alien woman who marries a citizen. We have in this case the converse of the proposition; the effect of the marriage of a native female citizen to a man who is not a citizen, but is a subject of some other country. In Pequignot *v.* Detroit (1883), 16 Fed. 211, Judge Brown, afterward justice of the United States Supreme Court, decided that an alien woman who had become a citizen under the aforesaid Act of 1855 by marrying a citizen, and who was divorced from that husband and thereafter married an unnaturalized alien, lost her citizenship by the last marriage and again became an alien, although both she and her last husband continued to reside in this country with the intention of remaining. In Ruckgaber *v.* Moore, 104 Fed. 947, decided in 1900, the court held that a native woman who marries a French citizen and thereafter resides with him in France

thereby loses her American citizenship and becomes a citizen of France, adding, however, that to accomplish this result she must, by residence abroad, or other equivalent act, express her intention to renounce her former citizenship by her marriage. Similar views were expressed in Trimbles *v.* Harrison, 40 Ky. 147. In Comitis *v.* Parkerson, 56 Fed. 556, decided in 1893, the court held that a native born woman who had married an alien subject of Italy, permanently residing in the United States and intending to continue therein, did not thereby lose her citizenship but remained a citizen of this country. The court said that the power to declare how the right of expatriation should be exercised, as well as that of naturalization, was exclusively in Congress, that expatriation could not take place without the consent of the United States, and that "Congress has made no law authorizing any implied renunciation of citizenship." It was mainly on this ground that the court rested its conclusion, although it was also said that in the absence of any law of Congress as to the method of expatriation, it could not be said to take place, unless it was manifested by a removal from this country and a residence elsewhere. (See also Beck *v.* McGillis, 9 Barb. 49; Shanks *v.* Dupont, supra; Jennes *v.* Landes, 84 Fed. 74; Kreitz *v.* Behrensmeyer, 125 Ill. 197–8.)

When an alien and a citizen intermarry, they not infrequently return to reside, either temporarily or permanently, to the country of the alien spouse, thereby giving rise to questions concerning their rights as citizens or aliens of the respective countries, from which there have ensued international disputes to be discussed and settled by diplomatic correspondence between the United States and the foreign country. The fact that the courts of this country have held variant opinions on some phases of the subject has caused some perplexity in the State Department and like diversity of opinions has appeared from time to time in the correspondence of that department. All the courts have agreed, however, that the entire subject of naturalization and expatriation, including the method by which each might or could be accomplished and manifested, is a matter within the exclusive control of Congress. Under these conditions, the United States Senate, on April 13, 1906, passed a joint resolution for the appointment of a commission to "examine into the subjects of citizenship of the United States, expatriation, and protection abroad," and make a report with proposals for legislation thereon. In June, 1906, the House Committee on Foreign Affairs, to which this resolution had been referred, requested the Secretary of State to select three men connected with the State Department, familiar

with the subject, to investigate and make the desired report and recommendations. In pursuance of this request Honorable Elihu Root, then Secretary of State, directed Mr. James B. Scott, Solicitor for the Department of State; Mr. David Jayne Hill, then Minister to the Netherlands, and Mr. Gaillard Hunt, Chief of the Passport Bureau, to make an inquiry, report and proposals for legislation, as requested. These gentlemen proceeded and on December 18, 1906, they made an elaborate and exhaustive report of 538 pages, with recommendations for legislation covering all the phases of the subject except that of naturalization, which was already provided for. With this document before it, Congress framed an Act which became a law on March 2, 1907. (34 U. S. Stats. 1228.) This Act now controls the subject referred to, including that involved in this case. Section 3 thereof is practically decisive of the case before us and it is as follows:

> That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

There is no escape from the conclusion that, under the provisions of this section, the plaintiff in this case, when she married Gordon MacKenzie, a British subject, thereupon took the nationality of her husband and ceased to be a citizen of the United States. Just as an alien woman who marries a citizen becomes a citizen herself, whether she wishes it or not, as the cases we have cited declare, so a female citizen who marries an alien becomes herself an alien, whether she intends that result as the consequence of her marriage or not. She must bow to the will of the nation as expressed by the Act of Congress. Owing to the possibility of international complications, the rule has generally prevailed, from considerations of policy, that the wife should not have a citizenship, nor an allegiance, different from that of her husband. The section aforesaid was intended to put this general doctrine into statutory form. When, after Congress by this Act had declared that her marriage to an alien would accomplish her expatriation, and she thereafter married an alien, she is conclusively presumed to have intended thereby to renounce her citizenship of the United States and become a subject of Great Britain.

It is suggested that the object of the Act, as expressed in its title, was to legislate solely for the protection of citizens abroad and therefore

that it should not be construed to apply to women who marry here and continue to reside in this country, or who marry an alien permanently residing in this country. As has been stated in reciting the origin of the Act, such persons frequently remove to the country of which the husband is a subject, or to other foreign countries. It was the obvious purpose to provide a rule which should govern in cases of that kind. Furthermore, the language of the section shows that it contemplates that an American *woman* included within its terms will in some cases reside in the United States after contracting the marriage with the alien, and that it intends that she shall continue to have the nationality of her husband during such residence here, so long as the marriage relation continues. The interpretation contended for would be contrary to this provision, and therefore it is not permissible.

Plaintiff's counsel also contends that the Act of Congress is contrary to the opening sentence of the Fourteenth Amendment to the Constitution of the United States declaring that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." In support of this position they cite In re Look Tin Sing, supra, and United States *v.* Wong Kim Ark, 169 U. S. 649. In the first mentioned case, which was decided in 1884, Justice Field of the United States Supreme Court, writing the decision for the Circuit Court of the United States for the District of California, held that a person born in the United States, of Chinese parents residing therein at the time of his birth and not members of the diplomatic force of China, was a native citizen of the United States and was not subject to the Act of Congress forbidding the re-entry into this country of Chinese who had returned temporarily to China, except where they had obtained a certificate allowing such return. This decision declares that a native born person of any race is a citizen, under the aforesaid provision of the Fourteenth Amendment, and it follows the familiar rule that such person remains a citizen so long as he chooses, provided he does no act which under our laws will have the effect of renouncing or forfeiting such citizenship. The Chinese Exclusion Act, it was held, did not affect the right of citizenship. But the quotation we have already given from this case shows that the court did not intend to hold and did not hold that the Fourteenth Amendment forbids expatriation, or takes from Congress the power to legislate concerning it. In United States *v.* Wong Kim Ark, the same question was involved and the same conclusion was reached. In the

course of its very elaborate discussion of the proposition that the Fourteenth Amendment affirms the "ancient and fundamental rule of citizenship by birth within the territory" (p. 693), the court said (p. 703): "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away." From this remark it is argued that a native born citizen cannot, since the adoption of that amendment, renounce his citizenship. But this by no means follows: The court in the quoted sentence was speaking of the power of Congress to deprive a person of his citizenship without his consent and for no sufficient or reasonable cause. In the next paragraph of the opinion the court says (p. 704):

> Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents or of any other country.

Thus the opinion relied on itself recognizes and declares that citizenship may be renounced, notwithstanding the provisions of the Fourteenth Amendment. As we have held that the act of the plaintiff here in marrying an alien was in effect a renunciation of her citizenship, it follows that she is not prevented from committing this act of expatriation by the aforesaid provision of the Fourteenth Amendment.

We think it advisable to state here that the question of the effect of the marriage of a native female citizen to an alien, where such marriage had taken place before the passage of the Act of 1907 aforesaid, is a question not involved in this case. It is not therefore to be deemed as a decision upon the question whether the section of the Act of Congress above quoted was applicable to and operated upon citizens of the United States who were at that time married to alien husbands. From what we have said the conclusion is clear that the plaintiff here is not now a citizen of the United States within the meaning of the Act of Congress above quoted, and as that act controls the question of her citizenship, and her right to vote is made by our Constitution, as amended in 1911, dependent upon her status as a citizen of the United States, and does not exist unless she is such citizen, she is not entitled to the exercise of the privilege of suffrage and cannot demand registration as a voter.

It is ordered that the writ applied for be denied.

We concur:

		SHAW, J.
ANGELLOTTI, J.	SLOSS, J.	MELVIN, J.
LORIGAN, J.	BEATTY, C. J.	HENSHAW, J.

BOOK REVIEWS

Commentaire de la Loi du 17 Juin 1909, ayant pour objet l'Acquisition et la Perte de la Nationalité Belge. By Fernand Glesner. Namur: Jacques Godenne. pp. 185.

In an introductory chapter M. Glesner traces the history of the legislation of his country relative to nationality, beginning with the union of the Provinces with France in 1794, indicating the effect of the political events following the occupation of Belgium by the Allied Powers in 1814, and the Belgian revolution of 1830, and showing the impress made by the French Civil Code. The result of these various influences was to impose upon the country somewhat diverse systems of nationality. The design of the law of 1909 was to remedy this defect and make the law more definite.

The author analyzes each provision of the law and points out where modifications have been made in the preëxisting law. He also makes comparisons with the French law and in many instances with the law of other countries.

The first article of the law, as M. Glesner states, "consecrates the principle of *jus sanguinis*," declaring that Belgian children, wherever born, to a Belgian father or to a Belgian mother if the father has no determined nationality, are Belgians. But while the law thus declares the principle of *jus sanguinis*, it departs from this principle in Article 7, which states that the child born in Belgium of foreign parents of whom one was also born in Belgium, or was domiciled there for a specified period, is Belgian, unless before the expiration of his twenty-second year, during which he shall have had a domicile in Belgium, he shall have elected foreign nationality. This is the *jus soli*. In relation to this matter, the author says:

> This is not the reëstablishment, pure and simple, of *jus soli*, since there are required besides birth, certain conditions of sojourn and stability, of a nature to indicate that the individual has dwelt among Belgians and acquired their mentality. But it is surely an important victory for that principle.

He adds that the framers of the law had a difficult task, as it was necessary, in order to prove Belgian nationality, to establish filiation far

enough back to find an ancestor born on Belgian soil at a period when one became a Belgian by the sole fact of birth on the territory, or by the effect of a treaty, or by a fact posterior to birth. As such proof is often impossible, the language of the text was adopted, it being deemed that an individual uniting the conditions prescribed in the law, would be almost always Belgian in heart and aspiration. Under this law an individual born in Belgium of foreign parents of whom one was also born there, has the faculty of repudiating Belgian nationality, while under the French law, in similar circumstances, the individual is French without option. Article 12 further recognizes the doctrine of *jus soli* in providing that the child born in a foreign country to a Belgian who himself was born in a foreign country, can always decline Belgian nationality, if he has in full right acquired the foreign nationality. And a further application of the *jus soli* is involved in the provision of Article 4, which declares that a child found in Belgium shall be presumed, in the absence of proof to the contrary, to be born on Belgian soil, and hence to be a Belgian.

Articles 5 and 11 of the law embody the almost universal rule that the nationality of a married woman follows that of the husband. M. Glesner calls attention to the fact that the new Belgian law, unlike the preëxisting law of that country and the law of some other countries, definitely declares that a change of nationality of the husband taking place after the marriage shall have the same effect on the wife's nationality as if the change occurred before the marriage.

Articles 2, 3, 4, 6, 8, 9, 12, 13, and 14 relate to the nationality of children. Article 3 contains the unusual provision that when the nationality of the parents at the epoch of conception would operate to confer Belgian nationality upon the child, and that at the epoch of the birth would not, regard to the epoch of conception shall be had in preference to that of birth. In his comments on this article, M. Glesner states that this puts an end to a controversy which had existed under the former Belgian law which left it doubtful whether it was necessary to consider the moment of conception, the moment of birth, or the one or the other, according to the interest of the child. Under this article, if a Belgian should change his nationality after conception and before the birth of a child, the nationality of the child would be Belgian.

By the provisions of Article 6, minor unmarried children of foreigners who voluntarily acquire Belgian nationality, become Belgians, with the option of renouncing such nationality by declaring their desire, upon

reaching majority, to recover foreign nationality. By making them Belgians in full right, the law goes a step further than the former Belgian law, which gave them the faculty of choosing Belgian nationality by means of a declaration to be made in the year of their majority. The law does not go as far, however, as the law of the United States of 1907, and state whether the children are required to go to Belgium if residing in a foreign country. Under the laws of the United States in such a case, the child is not deemed a citizen until he begins to reside permanently in the United States. The restricting word 'unmarried,' is inserted in the law for the reason that, otherwise, the minor married daughter might, through the voluntary acquisition of another nationality by the father, acquire a double nationality—that of the father and that of the husband. The commentator discusses the question whether, under the law, the minor child of a Belgian woman who has been divorced, acquires Belgian nationality, and reaches a negative conclusion, as otherwise the general principle of the preponderance of the father would be sacrificed.

Article 10, which relates to naturalization, merely refers to the Belgian naturalization law of 1881 prescribing the formalities of naturalization in that country.

Expatriation is covered by the provisions of Article 11, which provides for three modes, *viz.*, voluntary acquisition of foreign nationality, marriage, and foreign naturalization through voluntary acquisition of foreign nationality by the father. In discussing the meaning of the term 'voluntary,' as applied to the acquisition of nationality, the commentator states that a Belgian born in France and domiciled in France at his majority, who, under the French law, becomes French under condition that he does not decline the quality of Frenchman in his twenty-second year, loses his Belgian nationality if he does not, in the delay prescribed by the French law, manifest his intention to preserve it. In other words, it being incumbent upon him to fulfil a simple formality prescribed by a foreign law to remain Belgian, if he does not fulfil that formality, it is deemed that he has willed to become foreign, and in the eyes of the Belgian law, that is the sole thing which it is necessary to consider. M. Glesner further states that a woman loses the quality of Belgian who marries a foreigner of determined nationality or whose husband voluntarily acquires a foreign nationality, *if such nationality is equally conferred upon her by the foreign law.* "This new principle," remarks the author, "is founded on the need of establishing the unity of nation-

ality in the family, and differs from the rule of the Code Napoleon which was based on a presumption *juris et jure* that it was the will of the woman."

Article 8 provides for the acquisition of Belgian nationality by children where the parents have lost such nationality. The method is by declaration of intention and fixing of domicile in Belgium, such domicile to be established within a year after making the declaration. Article 9 provides that a child born in Belgium of a foreigner may acquire Belgian nationality by declaring his intention to do so and establishing his domicile in Belgium, in accordance with the formalities prescribed by Article 8. This must be done in his twenty-second year.

Article 13 provides for the recovery of Belgian nationality by one who has lost that quality, by a declaration of intention and establishment of domicile in Belgium.

M. Glesner's comments are clear and to the point. His style is simple and lawyerlike, and his commentary will be of practical value in construing the law.

FREDERICK VAN DYNE.

Manuel Élémentaire de Droit International Public. By René Foignet, Eighth edition. Paris: Arthur Rousseau. 1913. pp. 430.

This work, the popularity of which is evidenced by its having reached an eighth edition, is entirely elementary in character, and is, as it professes, intended especially for the use of students of law and candidates for diplomatic and consular careers. For this purpose it is admirably well designed. It seems to contain all of the elementary and essential facts with which the beginner in the study of international law ought to be made acquainted. Its purpose is not to elaborate or convince, but to inform. While we have no reason to question the general accuracy of the statements contained in it, yet some as to the United States and having relation to the form and operation of our government, are not precisely correct, the book not being brought thoroughly up to date as to our country.

JACKSON H. RALSTON.

Results of Three Years' Administration of Chosen Since Annexation. Seoul: Government General of Chosen. January, 1914. pp. 161.

Chosen, an ancient name of northern Korea, was officially adopted as the name of the new dependency after its annexation by Japan. Korea

once included a large part of southern Manchuria. Korean graves are numerous there and the inhabitants of certain districts in Manchuria are still largely Korean. The peninsula derived its civilization from China, and it was largely through Korea that Chinese culture was communicated to Japan.

At the beginning of the Christian era, China ruled directly all of northern Korea, while the southern portion was divided into three small states constantly warring, each with the others. In the seventh century A. D. China, having during the intervening centuries lost direct control of the country, again annexed all of the peninsula except a small state in the southeastern portion, which, however, became one of her dependencies. During the following centuries there were occasional brief periods of independence, but otherwise until 1895 Korea remained in one form or another a portion of the Chinese Empire. The envoys of the little kingdom were sent regularly every year until near the close of the nineteenth century bearing their tribute to the court at Peking.

In 1595 the Japanese invaded Korea and attempted its conquest, but were driven out. In 1876, however, Japan compelled Korea to enter into a treaty which assumed the independence of the little state, and this was followed by a treaty with the United States in 1882. In spite of these treaties, however, Korea continued to look to China as suzerain and received a Chinese Resident until after the Chino-Japanese war of 1894–5, when the independence of the kingdom was acknowledged by China. For a brief period Korea rejoiced greatly in this independence and the king, in order to assert his equality with the rulers of neighboring lands, on October 17, 1897, proclaimed himself an emperor. The independence, however, was short-lived and nominal rather than real. From being a bone of contention between China and Japan, Korea escaped only to find herself an object of strife between Japan and Russia.

In 1904 Japan found it necessary to assert herself against the Russian advance in Manchuria and avenge the loss of southern Manchuria which she had been compelled by the continued pressure of Russia, France and Germany to retrocede to China in 1895. Korea lay between the Russians and the Japanese and Japan was prompt to occupy it. The Russians were forced back northward into the province of Kirin, and the development of Japanese interests in the Kuantung Peninsula and elsewhere in southern Manchuria made Japanese control of Korea more than ever essential to the welfare of the island empire. A Japanese Resident was

therefore appointed to Seoul in 1906. For two decades before this Japan had labored to promote the reform of the Korean Government, but had met with very slight success. She had a following in the Korean court, but she also had many enemies there. Corruption was widespread and nullified all efforts for improvement. Prince Ito showed himself to be a true friend of the Korean people, but his well-meant endeavors were unappreciated and resulted only in his murder at Harbin in 1909. The Japanese Government then decided upon annexation as the only remedy for a situation, which to them seemed intolerable.

The report by Governor General Terauchi of three years administration of Chosen encourages the hope that the people of Korea may yet become reconciled to the annexation of their land by the Japanese Empire since, according to that report, it seems to be bringing to an end a regime of inefficiency and corruption and substituting therefor one that is promoting the development of the country and the education, enlightenment and prosperity of the people.

"The annexation of Korea by Japan," says Count Terauchi, "was a great epoch-making event. It has solved an impending problem confronting the Empire of Japan for centuries and is considered to have eradicated causes of disaster, consolidating thereby the foundations of the Empire and assuring lasting peace for the Far East."

The pamphlet which contains the report of the Governor General contains 161 pages, of which 66 are required for the report proper. The remainder forms an appendix containing important public documents that deal with the problems growing out of annexation. With the exception of the first, which is the proclamation of annexation, issued August 29, 1910, these documents are all instructions to public officers in Chosen. They cover a wide range of topics, including reorganization of the Government, monetary grants, Confucian education, cotton cultivation, sericulture, judicial reform, customs, charities, prisons, etc.

The administration of a hostile country comprising an area of 84,000 square miles and containing a population of 13,000,000 called for statesmanship of the highest order. Great tact was shown in introducing changes in the government. These were made very slowly. In the first year a reduction by 1434 was made in the number of officials and the retrenchment thus effected lessened the expense of the government by 765,000 yen. Further economies in 1912 led to the dismissal of 187 more functionaries and a saving of 478,000 yen. In 1913 the Imperial

Government was able to reduce its subsidy to Chosen by 2,350,000 yen.

It is, generally speaking, in the local government that officials come into close contact with the people and it is here that friction is most likely to occur. But the Japanese administration wisely refrained from offending local prejudices. Great care was taken to observe old usages and the reforms introduced were modified so as to adjust them to varying local conditions.

The improvement in police administration and the success of the Japanese in their efforts to restore good order are indicated by the figures given by Count Terauchi. Whereas in one year, 1908–9, the police had 780 encounters with brigands who numbered 34,400, in the year ended August, 1912, there was but 13 such encounters with some 70 outlaws.

Previous to the annexation the finances of Korea were in a very bad condition. A Japanese financial adviser was appointed in 1904, but it was not until a Japanese Resident General was appointed in 1906 that it was possible to introduce system and bring order out of confusion. For some years following, the Japanese Government was compelled to make considerable loans to Korea, amounting at the time of annexation to a total of 14,200,000 yen. But the Japanese Government also supported a Resident General and financed the new judiciary, so that the total expenditure by the Imperial Japanese Government averaged about 26,000,000 yen per annum for the four years preceding annexation. After that event the revenues of Chosen proved still to be insufficient to meet the expenditures and the deficit had to be met from the Japanese treasury. The appropriation for this purpose in 1911 was 12,350,000 yen. A similar appropriation was made in 1912 but in 1913 it was reduced to 10,000,000 yen. The total expenditure in 1913 amounted to 51,781,000 yen, an increase of more than ten million yen above the cost of government under the native rulers in 1909. The increase, however, was occasioned by extraordinary expenditures for railway construction, harbor improvements and other works requiring immediate alteration. The revenues of Chosen in 1913 were eight million yen larger than in 1909 and this improvement, which was effected without increase of taxation, was made possible by the more efficient administration introduced. Monetary reform, initiated by a Japanese adviser, began prior to annexation but was hastened by that event.

The foreign trade of Korea has been very steady in its growth since annexation. Whereas in 1909 it amounted to 52,890,000 yen, in 1913

it had grown to 102,450,000 yen. Railways have increased in mileage from 640 miles prior to annexation to 935 miles in 1913.

Very much has been done for education too. This reform began under Japanese advice as early as 1906. But at the time of annexation there were but 100 common public schools in the whole country attended by 15,000 children. Now there are 366 schools with 50,000 pupils. Attention is given chiefly to elementary and industrial education. Besides these public schools there are some 1,300 private schools of which about 500 are mission schools. These have been compelled to adjust their courses of study so as to comply with the Imperial curriculum.

It is interesting to note the attitude taken by the Japanese Government towards the three principal religions of Korea; Confucianism, Christianity and Buddhism. Previous to annexation an institute for the study of the Chinese classics existed in Seoul where religious festivals were held in honor of the Chinese sages, and, although it was not a part of the new educational system, the Japanese Government retained it because of the intimate connection between Confucianism and morality; 250,000 yen were appropriated to it in 1911 as a foundation fund. By this lectures on ethics are supported and certain officials are enabled to hold religious services.

It is pointed out by the Governor General that Christianity has gained great influence in Korea and is winning popularity and confidence. The Roman Catholics he credits with 80,000 adherents and the Protestants with 360,000. He compliments the Catholic missionaries by saying that their method of propagating the faith is practical and unostentatious. He says of the Protestant Christians that not a few people formerly embraced their faith with political and other mundane purposes though he admits that sincere and zealous converts are found.

There are some 40,000 pupils attending mission schools and the Governor General says:

> On account of their being affiliated with the Christian Churches it is but natural that the Bible should be, as it is, used as the foundation of moral teaching, and religious principles of the churches be inculcated in the pupils. In consequence there can not but be something desirable left untouched in the education undertaken in these schools as viewed from the point of the national education.

He points out that the best private schools are the mission schools and that it is inadvisable to close them, however desirable it may be to separate religion and education, because their suppression would leave a gap which the government at present could not fill. He adds,

For this reason for the time being the authorities concerned pay attention only to the prevention of evil that may occur on account of the presence of these schools, intending later to enforce the principle of education standing aloof from religion.

He refers to the disabilities under which the Buddhists were placed during the late regime. Annexation improved their condition and an ordinance was adopted in 1911 for reviving Buddhism and its propagation.

Thanks to this, more than 20,000 monks and nuns living in 1400 monasteries and convents were enabled to engage in their work, being given due protection and raised to the same position as other religious workers.

A great deal has been done by the Government General for the improvement of agriculture and other industries. Agricultural stations and schools were established where improved methods of rice-culture, sericulture and cotton growing were taught and stock-breeding was encouraged. Export duties on agricultural products were removed. The production of rice and other cereals as well as of other agricultural products has been considerably increased since annexation. The acreage devoted to cotton has been increased more than six times and the output of silk has been multiplied threefold. Equal attention has been given to fisheries. The value of the annual catch has been doubled. Korea is rich in minerals and encouragement is being given to this industry also. A technical training institute established by the Japanese at Seoul has led to improvement in textile and other ancient industries of Korea.

Korea is too well settled to invite the immigration of large numbers of Japanese, yet the influx of Japanese farmers and artisans has been considerable. In 1910 the total Japanese population was estimated at 146,000. In 1913 there were more than 264,000 Japanese resident there, of whom about one-fifth were farmers.

The report makes a favorable showing for the Government and will undoubtedly create a good impression abroad.

E. T. WILLIAMS.

Théorie Général de la Clause de la Nation la Plus Favorisée en Droit International Privé. By François Hepp. pp. 142. Paris: Juris-Classeurs. 1914. (5 francs).

This monograph may be resolved into two parts: first, an introduction dealing with the forms, the history, the legal character, and the general application of the most-favored-nation clause; second, a discus-

sion of the "Effets de la clause en matière privée." In the latter we find a substantial contribution.

M. Hepp has rightly conceived it necessary first to deal with the nature of the clause and its particular applications in public international law. Thus, after a useful classification and the exposition of a convenient terminology, he proceeds to deal with the history of the clause. Unfortunately, he has seen fit to reproach those who have made special study of the clause in advance of him for having been, as he conceives, satisfied with mere chronological cataloguing and indifferent to critical methods and logic. "* * * ils se sont obstenus de porter un jugment sur le lien logique qui unit les unes aux autres, à travers l'histoire, * * * et, c'est la chronologie qui tient, dans leur raisonement et leurs hypothèses historiques, la place de la logique." This generalization suggests too little consideration of the exhaustive work of Dr. Glier [1] which is cited in the bibliography, and unfamiliarity with the writer's *The Most-favored-nation Clause in Commercial Treaties.*[2] It is true that no writer previous to M. Hepp has devoted special attention to the clause in relation to private international law.

Many readers will differ with M. Hepp in some details as to the character and intent of the clause. All will agree with him, however, that

> * * * c'est en principe un traitment d'ordre économique qu'elle a pour but d'établir. Cependant, * * * elle peut fort bien avoir pour objet l'établissement et le maintien d'une autre égalité que l'égalité commerciale et la garantie contre d'autres risques que les risques commerciaux.

He is right in pointing out that the clause must be studied in each instance in relation to the treaty in which it appears and that the intention of the parties at the time of making each treaty must be given full consideration. He dismisses rather abruptly the American theory of the clause. He considers that American diplomats have developed "des conclusions théoriques, erronées à notre sens, et qui nous semblent de tous points contraires aux conséquences logiques de l'engagement des parties contractantes." This is somewhat summary, to say the least, and when we find a gross error in the first quotation which is made from an American treaty,[3] we are constrained to wonder whether M. Hepp has given the American theory and practice really close attention.

[1] Die Meistbegünstigungsklausel.

[2] Published in 1910.

[3] In quoting Article 14 of the United States-Japan treaty of 1894,—at p. 25—M. Hepp has it that the favors specified "sera immediatement et sans condition

As for theory and logic, whatever these may or may not have to say, the most-favored-nation clause is a practical instrument, and the forms and the interpretation which this and that nation give it in practice are determined by practical considerations. Different premises lead to different conclusions. The "American form" of the clause and the American interpretation have been developed to fit American commercial policy; both are well known to all countries with which the United States makes commercial treaties, and the difference between the American and the European practices is well established and understood.

M. Hepp's discussion is throughout affected by the theory of strict reciprocity which underlies Article 11 of the French Code Civil. M. Hepp overemphasizes the speculative character of the clause. "Au moment de la conclusion du traité qui contient la clause * * *, l'objet de l'engagement subscrit par les parties est absolument insaissible et de tous points aléatoire" (p. 60). "Sans doute les parties courent l'une et l'autre le risque de donner respectivement beaucoup en échange de peu de chose, mais elles ont des chances aussi de beneficier d'une situation contraire, et cet aléa est évidement de l'essence même d'un contrat aléatoire" (p. 75). The statesmanship of commerce is continually seeking positive assurances—especially against inequality of opportunity, and it is these which, in our opinion, the most-favored-nation clause is intended and should be conceived to give.

M. Hepp's real contribution lies in his exposition of decisions of the French courts as to their jurisdiction over cases brought, and of the judgments which the courts have rendered with regard to rights claimed under provisions of the clause. Here we find especial attention given to the provisions of Article 11 of the Code Civil in connection with those of Article 11 of the Franco-German Treaty of Frankfort of May, 1871. Dismissing with a few words the question of the application of the "general" form of the clause, and passing to the "specialized," or specialized reciprocal form, M. Hepp tells us that: Specifications with regard to matters of private rights are rare. The Court of Cassation has decided that there must be extended to subjects of an assured country all the private rights which the subjects of the most-favored-nation enjoy.

étendu," whereas, as a matter of fact, the real reading is that the favors will be extended "gratuitously, if the concession * * * shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional,"—as is usual in treaties of the United States.

Specifications with regard to economic and commercial matters must be interpreted according to the general character of the treaty,—but the applicant for rights under such provisions must make a showing, first, as to his personal status as one engaged in such commerce as the treaty provisions contemplate, and, second, as to the general rights extended to the variety of commercial enterprise in which he has engaged. The Court of Cassation has decided that in France the courts may undertake the interpretation of French treaties when the question involved is one concerning private rights claimed thereunder, but that, as for determining the original meaning of the treaty, this concerns the contracting parties and is the business of the executive department. The letter of a treaty indicates but very imperfectly the real intention of the contracting parties. In most cases the courts will have to call on the administrative departments for the exact intent of the stipulations.

M. Hepp next takes up various cases which the courts have handled. "In the matter of enjoyment of rights in a strict sense, the normal effects of our clause appear to conflict with the general principles enunciated in Article 11 of the Civil Code * * *" (p. 103). This article has as its basis the principle of diplomatic reciprocity, by which a foreigner enjoys in France the rights which Frenchmen enjoy by virtue of treaty provisions in the country from which that foreigner hails. "Is it then necessary to admit exceptions to this principle because of the clause, and to extend privileges which are not in the country of the foreigner's origin extended to Frenchmen?" M. Hepp believes that it is not.

> Selon nous, la regle de l'article 11 ne supprime nullement le droit du pays favorisée, mais elle combine avec lui pour se limiter, dans la mesure exacte ou il se trouverait limité si le traitement favorisé avait été stipulé sous la forme "américaine," ou mieux encore * * * sous la forme qu'il affecte dans un traite recent: la convention franco-russe du 14 avril 1912 * * * pp. 106–107.

The question is often raised whether foreign companies should enjoy the rights guaranteed to foreign subjects. Upon this point several cases are cited where the courts have decided in the affirmative, together with one where the decision was in the negative. As to the right of *hypothèque légale* of a married woman over the real property of her husband situated in France, several cases where such rights were claimed were decided adversely. The claim of the right of freedom of access to the courts has been sustained. Under *Conflits des Lois*, three cases are cited in which the question of the validity of a will made by an Englishman in France in English form, the question of whether the inheritance of a

Russian in France should escape the right of *prelèvement* and the question of the right of consular jurisdiction over the inheritance of a Turk in France were decided adversely. As to the competence of courts, some applications have been decided unfavorably on the ground that the clause applied to matters of commerce only and not to matters of competence and procedure. Some applications, however, have been accepted. M. Hepp concludes that no general rule can be laid down. On the question of consular competence, the Court of Cassation decided in a case against the Bank of Tunis that the competence accorded to an English consul by the Anglo-Tunisian treaty of 1863 must be accorded to a French consul (p. 129). Protection of rights in literary and artistic property can not be sought unless especially stipulated for, in which case the French courts have uniformly recognized the rights of the petitioners.

M. Hepp cites also a decision of the Supreme Court of Madrid to the effect that to extend certain privileges relative to communications between judicial authorities to a country which is not signatory to a special convention "serait étendre à un tiers un traitement exceptionel en vertu de la clause, ce qui est inadmissible." To this M. Hepp objects, but without informing us as to the general practice or the commercial policy of the Spanish Government.

In the absence of adjudication on the question of extradition, M. Hepp holds the opinion that, save in case of special specification, the clause will not apply to extradition.

The latter and main portion of M. Hepp's study presents much material that is at once enlightening, interesting and instructive.

STANLEY K. HORNBECK.

La Guerre Italo-Turque et le droit des Gens. By M. Andréa Rapisardi-Mirabelli. (Reprint from *Revue de droit international et de Législation comparée.*) Brussels: Bureau de la Revue. 1913. 206 pp.

It may admit of doubt whether this interesting history of the appropriation of Turkish Tripoli by Italy is properly a subject of review in a journal of international law, for the writer tells us at the outset of his volume of two hundred pages that "the study of the causes of a particular war is not a subject strictly within the purview of international law," and that although "there are writers who deem such a study as necessary to the juridical determination of the question as to which of

the belligerents has the right on his side," the author treats this as an "illusion" and considers that "the question lies outside of the domain of law just as the absolute freedom of states to make war upon one another whenever they consider it indispensable, is also excluded from the domain of law."

Africa is today the legitimate and the principal field open to the European need of expansion, as America was in the sixteenth century, and its northern portions are linked by the Mediterranean to the fortunes of the European countries upon its northern shores, which have inherited the rights of all-powerful Rome to that region, strengthened by their geographical situation. These are the primal needs that underlie wars; they are purely political questions, transcending the expedients of diplomacy busied with the search for superficial and so-called "efficient" causes which only mask the reality.

Italy having resurrected to a new national life, found it essential not alone as an outlet for its products, its capital and its population, but as a safeguard to its national existence and its progress to the position of one of the great Powers to take possession of territory whose political disintegration had exposed it to the unchecked occupation of the first comer, bold enough to take the lead.

This is the thesis which the writer presents as in accord with the actual and universal attitude of the nations, in spite of the sporadic efforts of peace foundations and peace congresses to displace it by the establishment of an international altruism.

The self-interest of nations is not, however, necessarily an incentive to war; Sig. Mirabelli's picture shows it rather as a strong factor for peace; not only the drain of modern armaments and the dreadful havoc of the perfected engines create a dread of the consequences of war; but still more the intervention of political grouping, such as the Triple Alliance and the Triple Entente and treaty coalitions, which stand for resistance to any hegemonous preponderance, add such new uncertainties as to the fruits of victory that even such temptations to aggrandizement as Tripoli offered to Italy, are apt to be kept in check by the consideration that the self-interest of neighbors will not permit Jack Horner to take too large a plum out of his pie.

These are powerful motives, says our author, which today work upon states to lay aside traditional rivalries, smooth over unexpected differences and labor towards agreements which will ensure peace, which he recognizes as "the least of all evils."

The French occupation of Algiers, the British claims to Cyprus, the French extension to Tunis, were but precursors of the Tripoli enterprise, all made possible by the adjustment of rivalries and the balancing of power among the European nations, ensuring the avoidance of European wars and the progress of European civilization.

The first move of Italy towards Tripoli was as early as 1890 as a counter-balance to French influence in Tunis, and in July of that year Lord Salisbury's support was assured, but the policy of international agreement was slowly maturing and Italy had to wait its development and the slow adjustment of the respective interests of herself and France on the Mediterranean, retarded by the Franco-German incidents of Morocco from Algeciras to Agadir. Tripoli, moreover, was territory of a European Power, so recognized and guaranteed by the Treaty of 1856, following the Crimean war, and thus presented additional difficulties to the benevolent assimilation of a protectorate,—while open armed attack would be perilous aggression,—of moment to all the countries whose rivalries protect her from dismemberment.

Her integrity had been protected by the Treaty of Paris (1856), but upon the assurance of internal reforms which were never realized, so that the guarantee of her integrity became by the Treaty of Berlin a virtual assertion of the right of intervention to compel observance of the promised reforms. Egypt, Cyprus, Crete, Macedonia, Bulgaria, Bosnia and Herzegovina are evidence of the disintegration brought about by the right of Europe to enforce the promised reforms; but in spite of private accords tending to Italianize Tripoli, warnings were repeatedly given that the territorial integrity of Turkey must be respected and that Tripoli was not unappropriated territory. But, if not unappropriated, it was surely "ungoverned" and an essential element in the European equilibrium on the Mediterranean, an equilibrium to which the recognition of Italian influence was indispensable.

Moreover, the Suez Canal had changed the current of European commerce with Asia and by so doing had exalted the problem of the balance of power on the Mediterranean into a question of world-wide significance.

Our author defends the occupation of Tripoli against the charge of aggression and imperialism and reconciles it with the utmost respect for "nationality" by assuring his readers that Mazzini and Garibaldi, both champions of universal democracy and foes of conquest and of colonial empire, early recognized the necessity for Italy to take her part

in the irrepressible movement of Europe for the occupation of the Mediterranean shores of Africa. Mazzini, who recognized the patriotism of other nationals on a par with his own, could never have justified the invasion of alien territory except under conditions unavoidable for national life, and the national life of Italy is dependant upon her share of the Adriatic and of the Mediterranean. Given this situation, the long-standing and proven incapacity of Turkey to ensure a civilized government with peace and safety to inhabitants and protection to trade, the rivalry of other nations for a control of the Mediterranean shore which meant atrophy to Italy,—in the present far from ideal condition of international relations, her only recourse was to the "ultima-ratio" of living nations,—war,—hastened by the agreement of France and Germany on the Moroccan question, early in September 1911.

The proximate or so-called "efficient" causes which our author characterizes as the negligible factors or incidents which diplomacy brings forward to mask the more deep-rooted differences or ambitions which bring nations into conflict, were in this case obvious subterfuges, consisting mainly in occurrences long since past and for the most part settled, and in the general grievance that Italy was not allowed that "preference in pacific penetration" to which she had a right as a preliminary to her ultimate claims upon the country.

The circular of the 29th September, 1911, to the various embassies and legations, recapitulated these grievances as the foundation for the appeal to arms. Previous to this circular, as early as the 19th of September, orders had been given for the mobilization of the Italian navy, and military preparations of a like character were set on foot, followed by like measures of the Turkish Government and the despatch of a war vessel from Constantinople to Tripoli, with troops, arms and munitions of war on the 22nd of September. A note of warning as to perils of the Italian colonists from this movement was signified by the Italian Minister of Foreign Affairs to Constantinople on the 23rd of September, but the unloading was begun on the 26th and Italy's ultimatum communicated to the Grand Vizier on the 28th of September, advising that as past negotiations had proved futile, the Italian Government found itself compelled to proceed with the military occupation of Tripoli and Cyrene, to which they requested Turkey to make no opposition, leaving definite arrangement to subsequent agreement. A peremptory answer was demanded in twenty-four hours. Receiving no answer, hostilities were at once begun as threatened in the ultimatum, without

any declaration of war, which only followed actual hostilities, begun by the attack on Prevesa.

The various chapters of the book take up, in addition to the "causes of the war," the "questions touching the initiation of a state of war," "neutral relations," "actual hostilities" and "the peace negotiations," all of which are treated with great fulness.

It would extend this review beyond available limits to enter into details upon these various questions. The opening of hostilities prior to a declaration of war is of special interest, and Sig. Mirabelli's defense of the procedure will repay notice. The ultimatum in terms advised the Ottoman Government that the Italian Government would "for the safeguard of its interests and of its dignity proceed to the military occupation of the territory." This the writer considers as an unquestionable notification of the military measures decided upon. The ultimatum then expressed the hope that the Ottoman Government would make no opposition to the measure, leaving to further parleys a definite agreement on the subject; a delay of twenty-four hours was fixed upon to await an answer. Accordingly, at the expiration of the twenty-four hours, the military occupation was begun, and as it met with opposition, the formal declaration of war was at once issued. This it is insisted, is in strict conformity to The Hague Convention of 19th October, 1907, which makes it lawful to open hostilities upon the expiration of an ultimatum, particularly when, as in this case, the ultimatum clearly indicated that the military occupation had been resolved upon.

Coming now to the criticism that Italy disregarded the obligations of Art. VIII of the Treaty of Paris (1856), which provided that "in the event of differences between the Sublime Porte and either of the Signataries, before having recourse to force, the mediation of the other signataries should be invoked." Such an appeal was at once made by the Sublime Porte on the 30th of September, but the only response was a declaration that the Powers would observe the most strict neutrality, and three renewals of the appeal evoked no other response.

Sig. Mirabelli repudiates the notion that Article VIII was obligatory and insists that its very language only makes it applicable "as far as circumstances will permit," leaving it optional to the Signataries to tender their good offices toward mediation or to remain neutral and indifferent spectators of the conflict. He contends, moreover, that the transformation of political conditions within the half century that has elapsed since the Treaty of Paris, the complex economic factors of inter-

national politics, accentuated in the Eastern question by the commercial revolution operated by the Suez Canal, make the proviso in Art. VIII essential to its usefulness or continued recognition.

The failure of Turkey's appeal to the Powers, leaving her isolated, provoked her to an immediate and heroic resistance, which brought on heavy losses and awakened Italy to the need of redoubling her efforts if she hoped to avoid a long and burdensome conflict. This she at once did and accompanied her re-enforcements with a decree of annexation of the occupied provinces under date of November 5, 1911, of which notice was at once given to all foreign offices, and then the Powers began their abortive efforts at mediation, which met with the insuperable obstacle of Turkey's determination not to surrender her territory and Italy's equally resolute stand to uphold her decree of annexation. Not until July, 1912, and then by direct but informal communication between the combatants, were negotiations for peace again undertaken, and not until October did the respective plenipotentiaries finally receive authority to negotiate, the point of danger being over the sovereignty of the coveted provinces. A last effort made by Turkey, after yielding the main point, that the treaty should only be operative when sanctioned by the respective parliaments of the contracting powers, imperilled the negotiations and met with an ultimatum which allowed Turkey three days to accept the terms or drop the negotiations, and a few hours before the ultimatum expired, on the 15th of October, 1912, a preliminary peace project was signed, no armistice or suspension of hostilities having been provided for. This preliminary project was followed by a firman of the Ottoman Government granting autonomy to the inhabitants of Tripoli and Cyrene, a proclamation of amnesty, of religious freedom by the Italian Government, the appointing of a commission composed in part of natives to make civil regulation respecting local customs; and the Sultan's *iradi* guaranteeing administrative and judicial reforms for the Aegean Isles which remained under Turkish sovereignty.

The final treaty of peace followed on the 18th of October, 1912, with few departures from the customary clauses. Italy, says Sig. Mirabelli, was generous in the terms accepted because "in truth she remained a debtor to Turkey by reason of the war, which she was forced to undertake in defense of her vital interests created by a historic fatality superior to her own will," and because, when all is said and done, "international equity" is still to be counted upon in dictating a treaty of peace. It was perhaps this sense of "international equity" which dic-

tated the clause by which the Turkish Government agreed to take back in its employ all the Italian functionaries discharged on account of the war, to preserve their rights to the pension funds and pay them for the time during which their service was interrupted.

Altogether the work of Sig. Mirabelli will repay careful reading, containing, as it does, the point of view of a faithful Italian subject with the study of one thoroughly versed in international complications and skilled in their presentation.

PAUL FULLER.

Memories of John Westlake. With portraits. London: Smith, Elder & Co. 1914. 157 pp.

This beautifully printed volume of 157 pages is an affectionate memorial to Professor Westlake, compiled, at the suggestion and with the coöperation of Mrs. Westlake, by his friends and associates in many lands. It consists of eleven chapters (three of them in French), each by a scholar of eminence, dealing with some phase of Dr. Westlake's many beneficent activities and services.

The introductory chapter, biographical and appreciative, is by J. Fisher Williams. A. V. Dicey writes the second chapter on "His Book and His Character." Professor Ernest Nys' chapter is headed "*La Science du Droit des Gens.*" Chapter IV, by Lord Courtney of Penwith, is entitled "Public Affairs." Chapter V, by Prof. A. de Lapradelle, "*L'Oeuvre de John Westlake.*" Chapter VI, by Norman Bentwich, "John Westlake as Teacher." Chapter VII, "*Extraits de la Notice consacrée à John Westlake,*" by Ed. Rolin-Jaequemyns. Chapter VIII, "The Balkan Committee 1905–1913," by Arthur G. Symonds, Secretary to the Balkan Committee. Chapter IX, "Finland" by Dr. J. N. Reuter, Professor at the University of Helsingfors. Chapter X, "The Working Men's College," by Sir C. P. Lucas, K. C. M. G., C. B. Chapter XI, "Tregerthen" (Dr. Westlake's interesting country house on the Cornish coast), by Marian Andrews and Gertrude Phillpotts. There is an appendix of eight pages giving "A list of the Writings of John Westlake," and an index.

Such memorial volumes, made up from diverse sources and by diverse hands, are in general perfunctory or extravagant without proportion or sequence and therefore inadequate, disorderly and disappointing. The present volume is a conspicuous exception to this general rule. It draws a strong, clear, affectionate but convincing portrait of a very great

scholar and a marked and distinctive personality; one whose life was protracted and whose attachments and connections were tenacious, unswerving and unselfish, and whose courage, energy and zeal "age could not wither nor custom stale."

John Westlake was born at Lostwithiel in Cornwall in 1828, his father a wool-stapler, his mother the daughter of a North Devon clergyman, a sporting parson who kept his own hounds but who was described by a rustic parishioner as "as good as a Methody."

He was first taught at home and in the local grammar school. He never went to a public school but was later educated by private tutors at Cambridge. Colenso and Harvey Goodwin taught him mathematics, Bateson, and Shilleto the classics. He entered Trinity and took his B. A. in 1848, bracketed sixth wrangler and sixth in the first class of the Classical Tripos, and was elected a fellow of Trinity in 1851. He kept terms at Lincoln's Inn and was called to the bar in 1854. In 1864 he married Alice, daughter of Thomas Hare, the famous advocate of proportional representation. In 1874 he took silk and was elected a bencher of Lincoln's Inn.

In 1888 he was appointed Whewell Professor of International Law at Cambridge, and this chair he filled for twenty years with great distinction, resigning in 1908.

The book that first made Westlake's name widely known was a Treatise on Private International Law or the Conflict of Laws, first published in 1858. This was almost wholly rewritten and brought out in a second edition in 1880, a third edition in 1890, a fourth in 1905 and a fifth in 1912. It was translated into German by Von Holzendorf in 1884 and into French by Paul Goule in 1914. It showed extended familiarity not only with English law and practice but also with the Continental law of Europe and tended to impress various of the Continental doctrines on English law, as, for instance, the exclusive character of the jurisdiction of the courts of the matrimonial domicile in certain cases of divorce and the dominance of the law of domicile generally. It became the leading English authority and for a time powerfully affected the decisions of the British courts. Dicey calls Westlake "the instructor of judges."

Westlake's work on international law he published in two volumes, that on *Peace* in 1904 and that on *War* in 1907, and de Lapradelle is now preparing a French translation of both volumes.

In 1913 Westlake edited for the Carnegie Institution of Washington

Ayala *De Jure et Officiis Bellicis et Disciplina Militari*, in two volumes. He published *Chapters on the Principles of International Law* in 1894, which was translated into French and Japanese.

He wrote the article on "International Law (Private)" for the supplement to the fifth edition of the *Encyclopedia Britannica*, "The Church in the Colonies" for *Essays on Church Policy* in 1868, and an *Introductory Lecture on International Law* in 1888, translated by Rolin into French. He was a frequent and constant contributor to the proceedings of various societies and many reviews and periodicals, especially the *Revue de Droit International et de Législation Comparée*.

As a result of these activities he received an honorary fellowship from Trinity College, Cambridge. Oxford gave him the honorary D. C. L., Edinburgh an LL.D., and the Free University of Brussels made him an honorary *Docteur en Droit*. He was decorated with the Italian order of the Crown and the Japanese order of the Rising Sun.

From 1900 to 1906 he was one of the representatives of the United Kingdom on the Hague Court of Arbitration.

He met a considerable success also as a practicing lawyer, especially in cases involving foreign law, but he had not the equipment of a successful advocate, though often before the Privy Council.

He, with Rolin-Jaequemyns and Asser, in 1869 founded the *Revue de Droit International et de Législation Comparée*, and in 1873, with Rolin-Jaequemyns and Bluntschli, and on the suggestion of Lieber, he took part in founding the Institute of International Law, whose president he became in 1895.

In 1854, with Maurice, he took part in founding the Working Men's College, where the Christian Socialists mingled with the later Utilitarians, and was its stanch supporter to the end of his long life.

In 1855 he was elected to the House of Commons from the Romford Division of Essex as a Liberal, but voted and spoke against the first home rule bill and lost his seat on the dissolution in 1886. He was able enough but not docile enough for a parliamentary career.

In 1873 he bought an old stone house and garden on the Cornish coast near St. Ives, called Tregerthen, and in 1881 he made his London home at the River House, Chelsea Embankment, and in these dwellings he and Mrs. Westlake exercised a most generous, delightful and stimulating hospitality to a wide circle of scholars and to many relatives and friends of every age. The writer recalls a delightful week at Tregerthen with a house party of fifteen, with innumerable walks and talks in the

fields yellow with gorse, teas on the heather, the treat for the village children with gifts and a wonderfully simple but inspiring little speech by Mrs. Westlake, the visit to St. Michaels Mount and the constant affectionate reference by Professor Westlake to the history of mythology of his ever dear Cornwall, the little church beautifully restored by his generosity, the immemorial and prescriptive field paths which he knew and whose antiquity delighted him.

The essays of these distinguished friends picture Westlake as a wonderful advocate of reason, a believer in progress, refusing to be pessimistic even when an octogenarian and almost deprived of hearing.

The writer recalls a little dance at Tregerthen when Professor Westlake, then over 80, found the greatest pleasure in the joyousness of his young guests.

Westlake twice visited America, and Mr. Williams thinks his suggestion of a "combination of mediative and judicial arbitration in the Venezuelan difficulty" averting "a fratricidal strife" was perhaps his most signal service.

Mr. Bentwich writes of Westlake as his old instructor and tells how he gained from him the conception "that law, while being an exact science, was intimately concerned with the maintenance and the extension of just dealing between individuals and between nations," and describes him as a dignified and impressive presence in the lecture room, informed by transparent knowledge and with an enthusiastic expression of it, and "outside his class room he was the most helpful and approachable of professors." His study was always conciseness and accuracy of statement.

The cause of any oppressed nationality he made his own. He succeeded Mr. Bryce as president of the Balkan Committee, which supported the cause of these communities against Turkish misrule, and in his advanced years he defended the liberties of Finland in the *National Review* and often in *The Times*.

M. de Lapradelle, in his highly interesting chapter on "*L'Oeuvre de John Westlake*," calls attention to the fact that other scholars have some of them been eminent in private international law, others in public international law, but that Westlake alone was equally eminent in both. Such double eminence is certainly unusual, but not wholly unique. M. de Lapradelle mentions Storey and Wharton, two of our great American scholars, as eminent only in private international law. It is respectfully submitted that M. de Lapradelle has overlooked Wharton's

invaluable *Digest of International Law*, published in three volumes in 1886 and republished in 1887, which is the foundation of Mr. John Bassett Moore's still more valuable and extended digest, and that Storey was regarded as an eminent international authority in public international law as well as in private, owing to his many elaborate and erudite opinions rendered in cases involving principles of international law.

Lord Courtney of Penwith recounts many services of Westlake under the chapter of "Public Affairs." He says "He was to the fore in every movement—social, educational, political—for the improvement of his generation. It was not a mere accident that he was found an advocate in nearly every suit of his time for maintaining liberty of opinion within the Churches."

In 1861 Westlake published a paper in the *Working Men's College Magazine* declaring "That the election of Mr. Lincoln upon the Chicago platform was a righteous act."

In the debate on Mr. Gladstone's home rule bill, after the general election of 1885, Mr. Westlake made a weighty speech, following a powerful and passionate argument by Sir Charles Russell. He confined himself to pointing out the complete absence in the bill of any executive authority to enforce in Ireland the will of the Imperial Parliament and also the difficulty of overriding the determined resistance of the north-east corner of Ulster and Lord Courtney says "These are to this day (November, 1913) the critical issues of the controversy," and it deserves to be noted how Westlake seized the points which remain outstanding.

It is a gratification to all students of international law to see that such a career can be made as was Westlake's, by one whose main occupation was in that branch. It is a satisfaction to see such a truly international memorial of his life, his work, and his writings, preserved and widely distributed. We respectfully congratulate Mrs. Westlake and the learned and distinguished authors who have contributed to it on the judgment, frankness, hearty affection as well as literary skill which has been devoted to the task. It dignifies with just appreciation the life of one who was perhaps England's greatest international scholar and ennobles the learning and service which filled his long life to its honored close.

CHAS. NOBLE GREGORY.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

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SUPPLEMENT—IMPORTANT TEXTS OF AN INTERNATIONAL CHARACTER

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ARMED MERCHANT SHIPS

I

INTRODUCTORY

So long as the rule of capture of private property at sea exists unimpaired, states with mercantile marines of any importance will find that one of the problems they have to face in war is to defend their sea-borne commerce, and to attack that of their adversary. On the 26th March, 1913, Mr. Winston Churchill, the First Lord of the British Admiralty, made an important statement in the House of Commons regarding the methods proposed by Great Britain for the protection of trade. As reported in the *Times* Mr. Churchill's speech was as follows:

I now turn to one aspect of trade protection which requires special reference. It was made clear at the Second Hague Conference and the London Conference that certain of the great Powers have reserved to themselves the right to convert merchant steamers into cruisers, not merely in national harbours but if necessary on the high seas. There is now good reason to believe that a considerable number of foreign merchant steamers may be rapidly converted into armed ships by the mounting of guns. The sea-borne trade of the world follows well-marked routes, upon nearly all of which the tonnage of the British mercantile marine largely predominates. Our food-carrying liners and vessels carrying raw material following these trade routes would, in certain contingencies, meet foreign vessels armed and equipped in the manner described. If the British ships had no armament they would be at the mercy of any foreign liners carrying one effective gun and a few rounds of ammunition. It would be obviously absurd to meet the contingency of considerable numbers of foreign armoured merchant cruisers on the high seas by building an equal number of cruisers. That would expose this country to an expenditure of money to meet a particular danger altogether disproportionate to the expense caused to any foreign Power in creating that danger. Hostile cruisers, wherever they are found, will be covered and met by British ships of war, but the proper reply to an armed merchantman is another merchantman armed in her own defence. This is the position to which the Admiralty have felt it necessary to draw the attention of leading shipowners. We have felt justified in pointing out to them the danger to life and property which would be incurred if their vessels were totally incapable of offering any

defence to an attack. The shipowners have responded to the Admiralty invitation with cordiality, and substantial progress has been made in the direction of meeting it as a defensive measure by preparing to equip a number of first-class British liners to repel the attack of an armed foreign merchant cruiser. Although these vessels have, of course, a wholly different status from that of the regularly-commissioned merchant cruisers such as those we obtain under the Cunard agreement, the Admiralty have felt that the greater part of the cost of the necessary equipment should not fall upon the owners, and we have decided, therefore, to lend the necessary guns, to supply ammunition, and to provide for the training of members of the ship's company to form the guns' crews. The owners on their part are paying the cost of the necessary structural conversion, which is not great. The British mercantile marine will, of course, have the protection of the Royal Navy under all possible circumstances, but it is obviously impossible to guarantee individual vessels from attack when they are scattered on their voyages all over the world. No one can pretend to view these measures without regret or without hoping that the period of retrogression all over the world which has rendered them necessary may be succeeded by days of broader international confidence and agreement than those through which we are now passing.

On the 15th April, 1914, it was stated in the *Morning Post* that a bill for the establishment of a mail line of armed vessels to South American ports had been introduced into the United States Senate, with the approval of Mr. Daniels, Secretary of the Navy. It would appear that the United States is going further even than the British Admiralty in establishing a state-owned line of armed mail steamers, and it is of interest to note that that Government is also turning its attention to the South American trade routes, as it was on ships of the R. M. Steam Packet Company on this route that guns for defence were first placed. There are now between 40 and 50 British merchant ships carrying guns for defence and others are in progress of being equipped. It has also been stated that German merchant ships are being similarly armed.[1]

The reasons for this reversion to a means of defending commerce by arming the ships engaged in trade, a development justly characterised by Mr. Churchill as regrettable and retrogressive, are to be found in the methods in which states have, since the abolition of privateering, arranged to increase their fighting forces on the outbreak of war by the

[1] See *Morning Post*, 16 April, 1914, "Merchantmen in war time," where a list of British ships already armed is given.

conversion of certain specially built merchant ships into fast cruisers, and to the fact that several important naval Powers maintain the right to convert these merchant ships into ships of war on the high seas. There are, therefore, on all the great trade routes of the world, merchant ships which may at a moment's notice, on receipt of a wireless message, change their peaceful character and from being commercial vessels become commerce destroyers.

This is not the place to deal with the arguments for and against the legality of such conversion. We can only take note of the fact that the Hague Convention of 1907, for the conversion of merchant ships into war ships, and the London Naval Conference of 1908–9, left the whole question of the place of conversion open.[2] The possibility of conversion on the high seas is undoubtedly a serious menace to great trading states such as Great Britain and the United States, both of whom deny the legality of such conversion. They have, however, to face the facts and take such measures in the defence of their sea-borne trade as shall best ensure its continuance in time of war. Already the naval charges of many states impose burdens on their peoples of increasing hardship, and instead of a great increase of cruisers for commerce protection, Great Britain, reverting to a practice common in the eighteenth and early nineteenth centuries, is arming her merchant ships in order that they may offer resistance to, and defend themselves against, the converted merchant cruisers of her potential adversaries. Mr. Churchill expressly stated in the House of Commons in introducing the Naval Estimates for the present year that instructions are given to the armed merchant ships to attempt no resistance to the ordinary ships of war, but only to endeavour to ward off attacks of the converted merchant cruiser. The armed merchant ship is therefore armed solely for defence, not for attack.

II

USE OF MERCHANT SHIPS IN WAR

The laws of naval warfare are drawn almost entirely from the practice of states in the past. In considering, therefore, the position of the de-

[2] See "The Conversion of merchant ships into war ships" in the writer's *War and the Private Citizen* (1912), 113–165.

fensively armed and uncommissioned merchant ship, it is the customary law of nations that is of chief importance. The position of these ships and their treatment in the past must therefore be first considered.

Three Classes to be Distinguished

Three classes of armed merchant ships may be distinguished in the naval wars of the seventeenth and eighteenth and early nineteenth centuries.

(1) *Merchant ships hired or bought by the state for incorporation temporarily or permanently into the navy.* From time to time states made up deficiencies in their naval forces by hiring or purchasing strongly built and fast sailing merchantmen. The Dutch in 1652 made up this deficiency in their navy by hastily arming merchantmen, the French did the same in the eighteenth century, and this was also done by England. The merchant captains were frequently left in command and were often part owners, with the result that they were reluctant to risk their ships. This reluctance was in no small degree responsible for the defeat of the English fleet off Dungeness on the 30th November 1652. To remedy this the Laws of War and Ordinances of the Sea published on the 25th December 1652 (the first Articles of War to which the English Navy was subjected) rendered the captains and ships' companies displaying reluctance to engage, and those guilty of slackness in defending a convoy, liable to the penalty of death. It was further ordered that captains of hired ships should be "chosen and placed by the state," and other officers were "likewise to be approved of." [3] These vessels were in all respects men-of-war and call for no further consideration.

(2) *Privateers.* The terms "privateer" or "private men of war," and "letter of marque ships" were in the latter part of the eighteenth century convertible. "Privateer" does not appear in use till the time of Pepys, and in 1718 it is not used in the issue of "Instructions for such merchants and others who shall have letters of marque or Commission for Private men of War against the King of Spain." There was at one time in England a distinction between privateer and merchant vessels furnished with letters of marque "the one being entitled to head money, and the other not, but" said Sir W. Scott in the *Fanny* (1814) "that distinction

[3] J. R. Tanner in *Cambridge Mod. Hist.*, IV, 474.

has been entirely done away with." [4] Privateers were vessels owned and manned by private persons but granted the authority of the state to carry on hostilities; they were used to increase the naval force of a state, "by causing vessels to be equipped from private cupidity, which a minister might not be able to obtain by general taxation without much difficulty." [5] In practice any prizes they captured were adjudged to their owners. British revenue cutters, though fitted out, manned and armed at the expense of the Government, were given letters of marque and were held to be private ships of war.[6] Privateers did not confine themselves to attacks on the enemy's commerce; in many cases they combined this with trading; [7] thus East Indiamen were usually furnished with letters of marque, not for the purpose of enabling them to defend themselves, but to ensure to the owners and crew, prize money and head money in case they captured their assailant.

The learning on the subject of privateers, of which there is a large body, may, however, since the Declaration of Paris, 1856, by which "privateering is and remains abolished," be considered as obsolete as between the parties to the Declaration. Their modern substitutes, the converted merchant cruiser, are of a very different character, and, as between the parties to the Sixth Hague Convention, 1907, and so far as they conform to its terms, are on the same footing as warships and subject to the "direct authority, immediate control and responsibility of the Power whose flag they fly" (Art. 1).[8]

(3) *The defensively armed but uncommissioned merchant ship.* The practice of ships arming in self-defence is a very old one. The seas were often infested with pirates, and when later, privateering was the normal

[4] 1 Dods. 443. Head money was paid to encourage ships of war and privateers to attack war ships and privateers of the enemy. There was a tendency to seek out rich merchantmen on account of their value in prize money, and by the Prize Act, 1805 (Sec. 5), £5 was to be paid for every man who was living on board the ship which was taken, sunk, burnt or otherwise destroyed at the beginning of the attack. Originally it was the reward of actual combat only; later, of the capture alone, whether with or without actual fighting. (*The Clorinde*, 1 Dods. 436.)

[5] W. O. Manning, *Law of Nations* (1875), 157.

[6] *The Helen*, 3 C. Rob. 224; *The Sedulous*, 1 Dods. 253.

[7] *E. g. The Fanny*, 1 Dod. 448.

[8] For commentary on the convention, see the writer's *Hague Peace Conferences*, 315–321, and *War and the Private Citizen*, 130–136.

method of attacking commerce, merchant ships were forced either to sail in convoys or to arm themselves; often they did both. Ships sailing on the Indian and American voyages, and even those in the Levant trade, carried large crews, heavy guns and a complete equipment.[9]

But in the seventeenth century arming was made compulsory in England. A proclamation of Charles I of 1625 appears to be one of the earliest orders issued in England, compelling merchant ships to arm in their own defence. The most important order, and one to which reference was frequently made on subsequent occasions during the seventeenth and eighteenth centuries, was an Order in Council of Charles II of the 4th December, 1672, which was made at a meeting at which the King and 26 members were present. Its importance warrants its being set forth in full:

> His Majesty having taken into his consideration of what ill consequences and loss it is, as well to the whole kingdom, as to the persons particularly concerned that merchant ships going out on foreign voyages in time of war are not sufficiently provided with guns, fire arms and other necessaries for their defence against the enemy, as well also that such ships are found frequently to forsake their convoys and the rest of their company, by which means it often happens that they fall into the hands of the enemy—It was this day ordered by His Majesty in Council, that all masters of vessels going out on any foreign voyage, as aforesaid, shall before they be cleared at the Custom house or permitted to sail out of any port of this kingdom on their respective voyages give good security to the Commissioners and officers of His Majesty's Customs that they will not separate or depart from such men of war as shall be by His Majesty appointed for their convoy, nor from the rest of their company, but that they will keep together during such their voyage, and mutually assist and defend each other against any enemy to the utmost of their power, in case they shall happen to be attacked, and that to this end they will take care their respective ships and vessels shall be well provided with muskets, small shot, hand grenades and other sorts of ammunition and military provisions according to the proportion of the men they carry. And of this His Majesty's pleasure the Commissioners and officers of His Majesty's Customs, and all others whom it may concern are to take notice and have due regard thereto accordingly.

Several times during the course of the eighteenth century, merchant ships were ordered to arm in self-defence, so as to avoid the necessity of sailing with convoys. In order to ascertain that no ammunition was

[9] J. R. Tanner, *Camb. Mod. Hist.*, IV, 467.

sold and that the ship fought only in self-defence, the master had to account for any expenditure of ammunition. Owing to the great demand for sailors to man the fleet during the Napoleonic era, a demand which was enforced by empressment, there was a lack of able-bodied seamen for ships of the British mercantile marine; compulsory arming fell in abeyance, and compulsory convoy was enforced. Still, many ships carried arms for their own defence, and ships so armed were distinguished carefully by prize courts from those with letters of marque. The British prize court stated in one case—"They may be armed only for their own defence: as they have no commission to act offensively they cannot be considered legally as ships of war, to the effect of entitling the captors to head money." [10] And in 1815 Chief Justice Marshall, of the United States Supreme Court, said "In point of fact, it is believed that a belligerent merchant vessel rarely sails unarmed. * * * A belligerent has a perfect right to arm in her own defence." [11]

It is thus clear that up to the end of the Napoleonic wars merchant ships either were compelled to arm in self-defence or armed in order to resist capture.[12]

III

LEGAL QUESTIONS RAISED BY ARMING MERCHANT SHIPS IN SELF-DEFENCE

The situation to-day bears a curious resemblance to that which existed a century ago with, however, certain modifications resulting from the

[10] By the court in *Several Dutch Schuyts*, 6. C. Rob. 48. This was a claim for head money for the capture of armed, but uncommissioned, Dutch transports.

[11] *The Nereide*, 9 Cranch, 388.

[12] The evidence of the arming of merchant ships and of their defending themselves from attack is to be found in such works as R. Beatson's, *Naval and Military Memoirs* and naval histories in general and in the records preserved in the British Public Record office, Admiralty Secretary "In-letters." Captain B. W. Richmond, R. N., has kindly given me references to several cases, such as the despatch from Admiral Sir Chaloner Ogle of 1st December, 1743, the capture of the San Domingo Convoy on 20th June 1747, the action between Commodore Barnett and three French China merchant ships on 25 January, 1745 (see Beatson, I, 258). In the case of the San Domingo Convoy, Beatson gives a list of the captured ships (I, 343) but does not mention whether they were armed or not. The original papers show that with few exceptions all were armed. In the battle of Finisterre, 3 May, 1747 the four armed French East India merchant ships, *Philibert*, *Apollon*, *Thétis* and *Dartmouth* sailing under convoy, took part. (Beatson, I, 341.)

Declaration of Paris, 1856, and the Sixth Hague Convention of 1907 which may be considered as a supplementary and explanatory treaty. Private merchant ships are still constantly hired as transports, though they are not generally armed or commissioned, and, therefore, retain their character of merchant ships. Most states have arrangements whereby in time of war certain vessels armed by private owners, companies or individuals, are taken over by the state and equipped with arms and incorporated into the fighting forces of the state. These vessels take the place of the old letters of marque or private ship of war; but they are no longer fitted out by private owners for their own pecuniary profit, but rank in all respects, when conforming to the Sixth Hague Convention, as public ships of war.

And lastly there is a return to the armed and uncommissioned merchant ship, not armed compulsorily under an Order in Council, but armed at the expense of the state, by the willing co-operation of the owners. We may not improbably see also in the next great naval war a return to the convoy system.

I am not concerned here with the policy, expediency or efficacy of the method which Great Britain and the United States are adopting as an additional protection to this sea-borne commerce; there are, however, several points of international law in regard to these armed merchant ships which their re-introduction make of practical importance. Those to be dealt with in this paper are (1) The right of such vessels to arm and defend themselves; (2) The consequence of a successful resistance and capture of the assailant; (3) The liability to condemnation of neutral cargoes on board enemy merchant ships.

(1) *The Right of a Merchant Ship to Arm in Self-defense. Opinions of Prize Courts in England and the United States*

It is of interest to note that the late Professor Freeman Snow in his *International Law*, the second edition of which was published at Washington in 1888, anticipated the action of Great Britain and the United States. He said:

> It may be reasonably expected in coming naval wars that steamers of the great mail lines will be armed so as to defend themselves from attack, rather than seek convoy, and the defence will be legitimately carried to

the point of seizure of the attacking vessel, or a recapture if once taken. Without a proper commission a private vessel, however, should act only directly or indirectly on the defensive, and not go out of the way to capture enemy vessels. It cannot, of course, take any belligerent action towards vessels of a neutral Power (p. 83).

This statement may be taken as embodying the rule generally acknowledged by English and American judges and writers. The right of an armed, but uncommissioned, merchant ship to resist is expressly laid down by Sir William Scott (afterwards Lord Stowell) in the *Catherina Elisabeth:* [13]

If a neutral master attempts a rescue, he violates a duty which is imposed upon him by the law of nations,—to submit to come in for enquiry as to the property of the ship or the cargo, and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner and it would, I think, extend also to the confiscation of the whole cargo entrusted to his care and thus fraudulently attempted to be withdrawn from the rights of war. With an enemy master the case is very different. No duty is violated by such an act on his part—*Lupum auribus teneo*—and if he can withdraw himself he has a right so to do.

The following extracts from the judgment of Chief Justice Marshall in the *Nereide* [14] also show that the law of the United States was the same:

The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is chargeable to the goods or their owner, where he has taken no part in it. They are incidents in the character of the vessel, and may always occur where the cruiser is belligerent.

The *Nereide* was armed, governed and conducted by belligerents. * * * It is true that on her passage she had a right to defend herself, did defend herself and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter party and of her duty.

Modern Naval War Codes

The right of resistance of merchant ships is recognized either directly or inferentially by the following national codes or naval instructions:

The U. S. Naval War Code, 1900, Article 10, paragraph 3: The personnel of merchant vessels of an enemy, who in self-defence and in pro-

[13] 5 C. Rob. 232.

[14] 9 Cranch, 388.

tection of the vessel placed in their charge, resist an attack, are entitled, if captured, to the status of prisoners of war.

The Italian Codice per la Marine Mercantile, 1877 Article 209: Merchantmen, on being attacked by other vessels, including war vessels, may defend themselves against and even seize them.

The Russian Prize Regulations, 1895, Article 15: The right to stop, examine, and seize hostile or suspected vessels and cargoes belongs to the ships of the Imperial Navy. Vessels of the mercantile navy have a right to do so only (1) when they are attacked by hostile or suspected vessels.

Opinions of International Lawyers

This rule is also recognized by writers of weight and authority in Great Britain,[15] the United States,[16] France,[17] Italy,[18] Belgium [19] and Holland.[20]

Lastly, the Institute of International Law at its meeting at Oxford in 1913, by Article 12 of the *Manuel des lois de la guerre maritime*, which it then adopted, laid down the following rule:

La course est interdite. En dehors des conditions determinées aux articles 5 et suivants, les navires publics et les navires privés, ainsi que leur personnel, ne peuvent pas se livrer à des actes d'hostilité contre l'ennemi.

Il est toutefois permis aux uns et aux autres d'employer la force pour se défendre contre l'attaque d'un navire ennemi.[21]

The discussion at the Institute showed that there was some opposition to the second paragraph of the article. Professor Triepel, of Berlin, desired to obtain its suppression, on the ground that an enemy merchant ship had no right to resist capture (as distinct from attack),[22] while Professor Niemeyer supported its suppression on a very different ground,[23] *viz.*, that to insert such a provision was equivalent to conceding

[15] Hall, 456; Oppenheim, II, 85; Phillimore, III, § 339; Twiss, II, § 97.

[16] Snow, 83, 84; Wheaton, § 528; Stockton, 179.

[17] De Boeck, *De la Propriété privée ennemie*, Sec. 212; C. Dupuis, *Le droit de la guerre maritime* (1899), 121.

[18] P. Fiore, §§ 1627, 1698.

[19] E. Nys, III, 181 (1906).

[20] J. H. Ferguson, Sec. 225.

[21] *Annuaire* (1913), 644.

[22] *Ibid.*, 516, 517.

[23] *Ibid.*, 519.

that a contrary opinion was possible. Ultimately the article was voted by a large majority.

The view unsuccessfully put forward by Professor Triepel at Oxford has since been advanced by Dr. George Schramm, legal adviser to the German Admiralty, in his *Das Prisenrecht in seiner neusten Gestalt* (1913), pp. 308–310. This author attempts to prove that "from the point of view of the modern law of war there is no legal foundation for the rule allowing a merchant ship to defend itself," and he carries on the same line of thought in regard to the treatment of the crew of such a ship when he says "it would have to be decided whether the hostilities were committed by members of the crew who are enrolled in the enemy forces or not. The former would be made prisoners of war, according to the analogous application of Article 3 of the Regulations of the Laws and Customs of Land Warfare; the latter would have forfeited treatment as peaceful subjects of the hostile state, according to usages of war they would be subject to the criminal law of the captor state" (p. 357).

Professor L. Oppenheim has dealt faithfully with Dr. Schramm's views in the *Zeitschrift für Völkerrecht* for April, 1913.[24] He has written therein what appears to me to be "*une réponse sans replique.*" I do not propose to enter into the details of the arguments advanced. I shall content myself with a summary of what in my opinion is the present position.

The right of a merchant ship to defend herself, and to be armed for that purpose, has not, so far as I am aware, been doubted for two centuries, until the question has again become one of practical importance. The historical evidence of the practice down to the year 1815 is overwhelming. Dr. Schramm, in his elaborate denial of the right, fails to distinguish between the position in which a belligerent war ship stands to an enemy merchant ship, and that in which it stands to a neutral merchant ship. This failure is important, and goes to the root of the matter, for whereas the visit of a belligerent war ship to an enemy merchant ship is, under existing law, merely the first step to capture and is itself a hostile act, and is undertaken solely in order to enable the captor to ascertain that the ship is one which is not exempt by custom, treaty or convention from capture; the visit to a neutral ship, though justified by the fact

[24] *Die Stellung der feindlichen Kauffahrteischiffe im Seekrieg.* Vol. 8, pp. 154–169.

of the existence of war, is not a hostile act. By long custom a belligerent war ship has a *right* of visit and search of all neutral merchant vessels, and this right is exercised in order to ascertain whether a vessel is in fact neutral, and not engaged in any acts such as attempting to break blockade, the carriage of contraband or the performance of any unneutral service which would justify its detention and condemnation. "It has been truly denominated a right growing out of, and ancillary to the greater right of capture. Where this greater right may be legally exercised without search [as in the case of enemy ships] the right of search can never arise or come into question." [25] A belligerent war ship has a right to capture an enemy merchant ship, and the latter is under no duty to submit; it has a corresponding right to resist capture, which is an act of violence and hostility. By resisting, the belligerent violates no duty, he is held by force and may escape if he can. But forcible resistance, as distinct from flight, on the part of a neutral merchant ship is universally admitted as a just ground for the condemnation of the ship,[26] for a neutral is under a duty to submit to belligerent visit.

(2) *Position of Crews of Captured Merchant Ships*

Another important point differentiates the neutral from the belligerent merchant ships, namely the position of their crews when the ships are detained. The officers and crew of an enemy merchant ship, even if they offer no resistance to capture, become prisoners of war, while the officers and crew of a neutral do not.

The United States Naval War Code in the passage already cited (Article 10) recognizes that the personnel of merchant vessels of an enemy who in self-defence and in protection of the vessel placed in their charge, resist an attack, are entitled, if captured, to the status of prisoners of war, and Dr. F. Perels, who was formerly legal adviser to the German Admiralty, quotes this with approval.[27] But this view is

[25] Marshall, C. J., in the *Nereide*, 9 Cranch, 388.

[26] See Declaration of London, Art. 63.

[27] "Gegen das Personal der Schiffsbesatzung soll im übrigen eine vorläufige Zurückhaltung an Bord soweit zulässig sein, als dessen Vernehmung für die Feststellung des Tatbestandes erforderlich erscheint, und es soll diesen Leuten eine anständige Behandlung zu teil werden. Dem entsprechen auch die folgenden Festsetzungen in den Artikeln 10 und 11 des N. W. C: (*Das Internationale Seerecht*, ed. 1903, p. 191).

based, according to Dr. Schramm, on a complete misunderstanding of the modern conception of the legal regulations of war as an armed conflict between states. Enemy merchant seamen have, however, for centuries been liable to this treatment, whether they resist capture or not, in consequence of their fitness for use on ships of war,[28] and this fact has an important bearing on the question of their resistance to capture. It may, however, be truly said that by virtue of the Eleventh Hague Convention of 1907, officers and members of the crew of a captured enemy merchant ship who are subjects of the enemy state, are entitled to be released if they give a written promise not to engage while hostilities last, in any service connected with the operations of war (Article 6). But if they refuse to give their parole, and by the laws of some states, such as Spain, they were formerly, at any rate, forbidden to give such promises,[29] they remain prisoners of war; therefore, the crew in defending their ships are defending themselves and their liberty, for release on the terms of the convention is but a modified liberty. The Eleventh Hague Convention recognizes that the crews of merchant ships are liable to be made prisoners of war by providing for their liberation on parole, but Article 8 states that the provisions of the preceding articles allowing release on parole, "do not apply to ships taking part in hostilities." Crews who forcibly resist visit and capture cannot therefore claim to be released—they remain prisoners of war. If an enemy merchant ship is called on to stop, the crew can, if they wish, "submit to capture and thereby have their freedom restricted, or they may resist and as a result be overpowered. In case they choose the latter course, their potential membership turns into actual membership in the armed forces of their state, and if overpowered they become prisoners of war. In case they choose the former course, their merely potential membership in the armed forces of their state remains intact, and they must either give parole or become prisoners of war." [30]

It would appear, however, that this Convention "is only applicable

[28] W. E. Hall, *International Law* (5 ed.) 407. Hall's note on Bismarck's denial of the right to treat merchant sailors as prisoners of war is emphatic, but, in my opinion by no means too strong. See F. Perels, *Das Internationale Seerecht*, 191.

[29] J. B. Moore, *Digest of International Law*, VII, 371.

[30] L. Oppenheim, *op. cit.*, 164.

between the contracting Powers, and only if all the belligerents are parties to the Convention" (Art. 9). Among the Great Powers, Russia has not signed, and Italy has not ratified the Convention, and many of the other Powers, *e. g.*, Bulgaria, Greece, Montenegro and Servia have not ratified it. When such a Convention is not legally applicable, any of the belligerents may, of course, mutually agree to its terms being carried into effect.

(3) *Crews of Armed Merchant Ships are Lawful Belligerents*

The chief reason why in land warfare special requirements and organization are necessary to confer the privileges of lawful combatants on armed bodies of men, is to ensure that the peaceful artisan or agricultural laborer shall not change his character from day to day. If he is to have the immunities of a non-combatant, that character must be clear and unequivocal. But even in land warfare, Article 2 of the Hague Regulations makes provision for the exceptional case of the spontaneous resistance of the inhabitants of a territory who rise at the approach of an invader, and grants them belligerent rights if they do not comply with all the requirements of Article 1, but only "carry arms openly and respect the laws and customs of war." The crew of a merchant ship is a body of men acting together in defence of their ship and their liberty, a body of identifiable individuals who by the customary law of nations have received combatant privileges when resisting capture by an enemy war ship. They offer a striking analogy to the spontaneous rising of the inhabitants of an unoccupied territory, who have now received by convention the right which merchant sailors have had for centuries.

IV

A DEFENSIVELY ARMED MERCHANT SHIP, IF ATTACKED, MAY LAWFULLY CAPTURE ITS ASSAILANT

Should the resistance of the crew of a defensively armed, uncommissioned merchant ship be so successful as to enable them to effect the capture of their assailant, such captured ship is good prize as between the belligerents. But the right of the captors to prize money in respect

thereof, is a matter of municipal legislation. The general rule of English law, as stated by an Order in Council of 4 January 1666, was that all ships and goods casually met at sea and seized by any vessel not commissioned do belong to the Lord High Admiral. Some four years later, in order to encourage masters to fight their ships more stoutly against pirates, a statute was passed [22 & 23 Car. II, cap. 9 (1)] modifying this rule and providing that "in case the company belonging unto any English merchant ship shall happen to take any ship, which ship shall first have assaulted them, the respective officers and mariners belonging to the same, shall after condemnation of such ship and goods have and receive to their own proper use such part and share thereof, as is usually practised in private men of war."

The rule of law laid down by the Order in Council of 1666 has been observed in England since that date; such goods and ships taken by uncommissioned ships belong to the Crown as Droits of Admiralty. The present law is contained in the Naval Prize Act, 1864, section 39: "Any ship or goods taken as prize by any of the officers and crew of a ship other than a ship of war of Her Majesty shall, on condemnation, belong to Her Majesty in Her office of Admiralty." The Naval Prize Bill introduced in 1911, and rejected by the House of Lords, contained a similar clause.

The law of France was formerly the same as that of England, but to-day the prize is given to the captor. A similar rule prevails in Holland.[31]

[31] En France, sous l'ancien régime, les prises faites *en se défendant* étaient acquises à l'amiral "dont la générosité le portait, la plupart du temps, à en faire don au capteur, en récompense de sa bravoure," au témoignage de Valin et d'Emerigon. Aujourd'hui, aux termes de l'art. 34 de l'arrêté du 2 prairial an xi, la prise faite par un bâtiment attaqué qui parvient à s'emparer de l'aggresseur est acquise au capteur; l'art. 34 a été assez fréquemment appliqué par le Conseil des Prises dans les guerres de l'Empire. La même règle est admise, notamment en Hollande." C. De Boeck, *Propriété privée*, § 212. Prof. de Boeck adds the following footnote: "Quant à la prise qu'un navire non commissionné et armé pour sa défense aurait faite en attaquant, elle est bonne quant à l'ennemi, mais confisquée au profit de l'Etat; l'auteur pourra même être poursuivi et condamné comme pirate."

See also Abdy's edition of Kent's *International Law*, 246; E. Nys, *Le Droit International* (1906), III, 181.

V

THE POSITION OF NEUTRAL GOODS ON BOARD DEFENSIVELY ARMED MERCHANT SHIPS

The re-introduction of the armed merchant ship raises another question which is of importance to neutrals, *viz.*, how far a neutral merchant has a right to lade his goods on board an armed enemy vessel, and what will be the consequence of resistance on the part of the enemy master. This question was discussed by the prize courts of Great Britain and the United States during the war of 1812–14. The cases dealing with this matter are the *Fanny* [32] in England and the *Nereide* [33] and the *Atalanta* [34] in the United States. In the *Fanny* neutral goods were laded on an armed merchant ship furnished with letters of marque, the neutral having knowledge of the facts. Sir W. Scott held that a ship furnished with a letter of marque was manifestly a ship of war, and could not be otherwise considered though she acted in a commercial capacity. The mercantile character being superadded did not predominate over or take away the other. A neutral subject was entitled to put his goods on a belligerent merchant vessel, subject to the right of the enemy, who might capture the vessel but who had no right, under the modern practice of civilized states, to condemn the neutral property. Neither would the goods of the neutral be subject to condemnation, although a rescue should be attempted by the crew of the captured vessel, for that was an event which the merchant could not have foreseen. But if he put his goods on board a ship of force, which he had every reason to presume would be defended against the enemy by that force, the case then became very different. It was clear, he held, that if a party acted in association with a hostile force, and relied upon that force for protection, he was *pro hoc vice* to be considered as an enemy. In the American case of the *Nereide*, which was subsequently affirmed in the *Atalanta*, the court was divided. Five judges sat, two (one of whom was Chief Justice Marshall) decided in favor of the neutral claimant; two (one of whom was Mr.

[32] 1 Dod. 448.

[33] 9 Cranch, 387.

[34] 3 Wheaton Rep. 400. See on this subject Wheaton, *Elements*, § 529 and Dana's note; R. Wildman, *Institutes of International Law*, II, 126.

Justice Story), against him, and the majority was obtained by the course of Mr. Justice Johnson, who decided for the neutral on special grounds, though in the *Atalanta* he gave his adherence to the general principle laid down by Marshall, C. J. The dissenting opinion of Story emphasized a fact on which the majority laid no stress, *viz.*, that the vessel was sailing under enemy convoy, and that the claimant, being the charterer of the whole vessel, had bound her to sail under this convoy; that the vessel was captured with the claimant on board, while accidentally separated from the convoy and endeavoring to rejoin it. The case of the *Nereide* differs in an important point from the *Fanny*, in that it appears to have been an uncommissioned armed merchant vessel belonging to a belligerent which resisted capture; whereas the *Fanny* was a commissioned ship of war. The *Nereide*, however, was under enemy convoy, and it is submitted that the dissenting judgment of Story is on the facts of the case more in accord with the principle of unneutral conduct.

Since these cases were decided, the parties to the Declaration of Paris have agreed that neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag (Article 3) and that privateering is and remains abolished (Article 1).

It does not appear that there is a definite decision on the question as to the fate of neutral goods laden on a defensively armed and uncommissioned enemy merchant ship either in Great Britain or the United States. Sir W. Scott in the *Catherina Elizabeth* stated that in case of rescue by the capturing ship, neutral goods would be free. Between such an attempt made after capture, and a resistance to capture involving an attempt to take the assailing vessel previous to capture "there does not seem to be a total dissimilitude." [35] It is submitted that in such a case the opinion of the American court in the *Nereide* will probably be that which will be adopted, namely, that neutral goods placed on an uncommissioned armed merchant vessel belonging to a belligerent, and resisting capture, are not subject to condemnation, if the armament be entirely and exclusively the act of the belligerent owner, and the resistance in no degree imputable to the neutral. The Declaration of Paris by abolishing privateering left the status of the merchant ship untouched. The right of an enemy merchant ship to defend herself was unquestioned, as was

[35] *The Nereide*, 9 Cr. 388.

also her liability to capture. The granting of the right to neutrals to send their goods on belligerent vessels does not deprive the belligerent of his right to resist visit and capture, so long as his ship remains an uncommissioned ship of war, "a ship of force" to use Lord Stowell's expression; but belligerents, by according neutrals the right, have at the same time deprived themselves of the advantage they might once have had of saying that the neutral is in fault and his goods are liable to condemnation, because the cruiser being armed can the better effectuate his right to defeat search or capture. The enemy ship and cargo may still be captured as an act of war, but if the neutral shipper has done no more than send his goods in an enemy vessel, his cargo or its value should be restored.[36]

The majority of the court in the *Nereide* appears to have gone too far in asserting that as all merchant vessels during war are generally more or less armed, it is impossible for a prize court to distinguish between different degrees of armament. There is a great distinction between commissioned and uncommissioned armed merchant vessels; the former may, the latter may not, act on the offensive, and the arguments of Sir W. Scott and Mr. Justice Story in regard to the treatment of goods placed on board vessels of the former class may well be accepted, but rejected in the case of the latter, which were not in question. It is submitted therefore that neutral cargoes placed on board merchant vessels converted into war ships under the terms of the Hague Convention of 1907 should be liable to be condemned on the principle laid down by these two distinguished judges, while those placed on armed but uncommissioned merchant ships should, under the Declaration of Paris, be released.

A. PEARCE HIGGINS.

[36] See Dana's note in Wheaton's *Elements*, § 529.

RESTRICTIVE CLAUSES IN INTERNATIONAL ARBITRATION TREATIES

The above is the title of a very instructive article in this Journal for April, 1913,[1] by Dr. Hans Wehberg, who points out and analyzes the special grounds for the different reservations contained in several arbitration treaties concluded up to the present time, with the suggestion that such reservations might henceforth be restricted merely to two, that is to say, the exceptions of "vital interests" and "national honor."

The more widespread the notice of treaties of this kind, the easier it will be to form a definite opinion as to their practical value considering the restrictive stipulations contained in them. It is this thought which leads me to write this article, the main object of which is to make known the nature and extent of the arbitration treaties existing between Brazil and other states, European and American.

Up to the present time Brazil has entered into arbitration treaties with thirty-one states, nearly all of which have been ratified by the respective governments. Twelve of these treaties were made for a period of ten years, and nineteen for a period of five years. The first arbitration treaty was signed with Chile in 1899; the second with Argentina in 1905; and the remaining twenty-nine with different nations from 1909 to 1911.

Glancing at their stipulations containing reservations or exceptions, we find that such stipulations deal with the legal nature of controversies, constitutional precepts, vital interests, independence or sovereignty, national honor, territorial integrity, of the contracting parties, and, finally, the rights of third parties. To these I do not add the restriction excluding "controversies which may not have been settled by diplomacy, direct negotiations or any other conciliatory agencies," because such a stipulation must be considered superfluous, it being presumed that such questions as might have been settled through other friendly ways would lack any ground to be referred to arbitral decision.

[1] Vol. 7, page 301.

With a view of presenting an adequate illustration of the subject, I quote the first article of the different arbitration treaties containing the aforesaid reservations:

BRAZIL—CHILE

The high contracting parties pledge themselves to submit to arbitration the controversies which may arise between them, during the period of the existence of the present treaty, concerning claims of *a legal nature* and which it has not been possible to settle by direct negotiations.

BRAZIL—ARGENTINA

The high contracting parties pledge themselves to submit to arbitration the controversies which may arise between them and which it may not have been possible to settle by direct negotiations or any other conciliatory agencies; provided, that such controversies do not affect *the constitutional precepts* of either of the two countries.

BRAZIL—BOLIVIA

The high contracting parties pledge themselves to submit to arbitration the controversies which may arise between them and which it may not have been possible to settle by direct negotiations or any other conciliatory agencies; provided, that such controversies do not affect *the vital interests, territorial integrity, independence or sovereignty, or the honor of either of the two states.*

BRAZIL—ITALY

Controversies of whatever nature which may arise between the high contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to a friendly government or to the Permanent Court of Arbitration established at The Hague, or to one or more arbitrators selected by common agreement by the high contracting parties without limitation to the list of the members of the aforesaid court; provided, that such questions do not affect *the independence or the constitutional precepts* of either the one or the other state, and do not concern *the interests of a third Power.*

BRAZIL—UNITED STATES OF AMERICA

Differences which may arise of *a legal nature or relating to the interpretation of treaties* existing between the two high contracting parties, and which it might not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague; provided, nevertheless, that they do not affect *the vital interests, the independence, or the honor* of the two countries, and do not concern the *interests of third parties;* and it being further understood that in case

either of the two high contracting parties shall so elect, any arbitration pursuant hereto shall be had before the chief of a friendly state or arbitrators selected without limitation to the lists of the aforesaid Hague Tribunal.

BRAZIL—NORWAY, and BRAZIL—SWEDEN

Whatever controversies; provided, that they do not affect *the vital interests, the independence or the honor* of the two contracting parties.

BRAZIL—RUSSIA

Controversies which do not affect the independence or the sovereignty of the contracting parties, and only relating to:

(a) matters of international private law;

(b) the regimen of commercial and industrial corporations, when organized according to the law of either country;

(c) matters of civil and criminal procedure, and to extradition.

BRAZIL—GREECE

Controversies which do not affect the *independence or sovereignty* of the contracting parties and relating to:

(a) the interpretation or application of treaties;

(b) pecuniary claims.

BRAZIL—GREAT BRITAIN

Differences of whatever nature which may arise between the high contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration at The Hague, to the chief of a friendly government or to such other arbitrators or tribunal as the parties jointly select; provided, nevertheless, that they do not affect *the vital interests, the independence or the honor* of the two contracting states and do not concern the interests of third parties.

From what has just been quoted, it results that the arbitration treaties to which Brazil is a party may be classified, as to their reservations, in the following groups: [2]

I. Treaties containing one exception or reservation:

(a) Controversies of a legal nature: Treaty with Chile;

(b) Controversies not affecting constitutional precepts: Treaties with Argentina, Uruguay, and Denmark.

II. Treaties containing two reservations:

Controversies not affecting independence or sovereignty, and *only re-*

[2] The same classification as adopted by Dr. H. Wehberg.

lating to the matters specified in the treaty: Treaties with Russia and Greece.

III. Treaties containing three reservations:

(a) Controversies not affecting constitutional precepts or independence, or the interests of a third Power: Treaty with Italy;

(b) Controversies not affecting the vital interests, independence, or national honor: Treaties with Norway and Sweden.

IV. Treaties containing four reservations:

(a) Controversies concerning the vital interests, territorial integrity, independence or sovereignty, or the national honor: Treaties with Peru, Bolivia, Colombia, and Paraguay;

(b) Controversies not affecting the vital interests, independence, national honor, or the interests of third parties: Treaty with Great Britain.

V. Treaties containing five reservations:

Controversies of a legal nature or relating to the interpretation of existing treaties, and not affecting the vital interests, the independence or the national honor, or the interests of third parties: Treaties with The United States of America, Mexico, Cuba, Haiti, Venezuela, Santo Domingo, Ecuador, Panama, Costa Rica, Honduras, El Salvador, Nicaragua, Portugal, Spain, France, Austria-Hungary, and China.

As will be seen, the restrictive clauses in the arbitration treaties concluded by the Brazilian Government are similar to, if not identical with, those agreed to by the governments of the several states in treaties of the same kind. But all of them undeniably show very little confidence in arbitration on the part of the different states for the settlement of their controversies. It is a fact that no state has ever intended or desired to go farther than the Hague Conferences have done in this regard.

I am quite of the same opinion as Dr. Hans Wehberg, that the reservations referred to may or should be reduced to an irrecusable minimum. But I can not concur in the views of that distinguished writer, when he says that the states might agree, in case they should not prefer a still more limited formula, to confine themselves in their treaties to the stipulations of "national honor" and "vital interests." [3] On the contrary,

[3] This JOURNAL, April, 1913, p. 306.

it seems to me that these two exceptions will be most susceptible of preventing recourse to arbitration in a large number of cases.

"National honor" and "vital interests" are words of an abstract or indefinite meaning, which allow the contending parties, in view of the circumstances and of their interests, to adopt a different interpretation of the controversies arising between them, and thus to declare such controversies not referable to arbitral settlement.

On one hand, if the two clauses—"vital interests" and "national honor"—are intended to embrace identical reservations, such as "constitutional precepts, independence, integrity of territory, and sovereignty," it is clear that no real reduction of reservations will take place in arbitration treaties, there being only a diminution of words, that is to say, instead of being all those reservations mentioned *nominatim* in the said treaties, they would subsist therein although under a more shortened formula, *i. e.*, the "vital interests" and the "national honor."

The question, as I see it, is not one of words, but of a real elimination of restrictions in arbitration treaties.

On the other hand, if the clauses referred to contain in themselves a particular meaning or are intended for special and different purposes, what should be evidently necessary is, that they be justly and properly defined in order that one may rightfully judge of their merits or of their superfluity in said treaties.

So many exceptions or reservations make, in fact, the respective treaties very often ineffectual with regard to their real purpose, namely, arbitration, inasmuch as the cases referable to arbitration, outside of those included in such clauses, become in practice very few and even perhaps insignificant.

Supposing that the states are really sincere in entering into arbitration treaties, it might be advanced that only controversies regarding the existence of states should be excluded from the treaties, that is to say, the inclusion of reservations concerning their independence as sovereign states. On the contrary, it may be said that the reservation of the independence or sovereignty of a state from the obligation to arbitrate is unnecessary, they being expressly established by the mere existence of treaties of this kind, for the making of these treaties presupposes before-

hand the reciprocal acknowledgment of the independence and sovereignty of the contracting states.

In this connection, there is no reason for the retention of the reservation of "constitutional precepts" as a special clause, because it is equally known that no state can bind itself in any way contrary to the provisions of its own constitution. State constitution is somewhat inherent in state sovereignty and independence.

The same observation might be made respecting the reservation of "the integrity of territory," provided, nevertheless, that under such a reservation are not to be included either differences arising out of the annexation or occupation of new lands, or over state boundaries, and the like. The latter subjects may be, and have already been, referred to arbitral settlement.

Also there exists no real ground for the restriction regarding "the rights of third parties," because, as it has already been wisely observed, if the third state assents thereto, there is not the slightest obstacle in the way of an arbitral settlement,[4] and if the third state does not assent, the said clause becomes entirely superfluous by force of the well known rule *Res inter alios acta alteri nocere non debet.*

Finally, it would be most desirable that the exception "*questions of a legal nature only or relating to the interpretation of treaties,*" should disappear, as soon as possible, from arbitration treaties. Although such a clause is in accordance with the convention adopted on this subject by the Hague Conferences, yet the manifest trend of opinion of the present time requires the field of arbitration to be more and more enlarged, and not to be narrowed to questions of a purely legal nature or relating to the interpretation of treaties. It is obvious, that on account of this limitation a very great number of controversies otherwise susceptible of arbitration may be excluded from such a pacific solution.

In short, the most desirable formula seems to be this: "Controversies of whatsoever nature; provided, that they do not affect directly the independence of either of the contracting parties."

In addition to what has been said, I may be permitted to make on this occasion some other remarks upon the causes which, to my mind, con-

[4] This JOURNAL, Vol. 7, p. 307.

tinue to prevent more progressive steps in behalf of obligatory arbitration or at least the enlargement of the number of classes of cases referable to voluntary arbitration itself.

Indeed, the very great service which up to the present time the Hague Conferences have rendered has been to adopt arbitration, although not obligatory, and create the Hague Tribunal for settling international controversies.

Compulsory arbitration or a world treaty for the preservation of general peace, are things not yet to be expected, at least, so long as the so-called family of nations is based upon the principles of absolute sovereignty, which underlie it, not taking into consideration different and special circumstances which may at any and all times occur as a ready cause for war. We should not entertain any illusions in this regard. Certainly, no reasonable pacifist and no practical statesman has ever pretended or expected that war might be suppressed forthwith by the vote of nations, even although assembled in conferences of peace. In spite of our best hopes and wishes, war is and shall be for a yet indefinite time a sad condition inherent in the existence of the civilized nations of the world. What is desirable and really practicable at this time is to continue to work for a gradual elimination of war from as large a number of cases as possible in the ordinary relations of international life.

In the first place, the events of the last few months show, what was equally well known before, that the great world Powers, notwithstanding their frequent utterances in favor of general peace, remain in the same unchanged state of mind, that is to say, that they depend much more for the maintenance of their high place, rights, and interests in international relations upon their great military force than upon any other element be it of the highest moral relevancy or excellence. These, and other Powers, when assembled in the Hague Conferences, have, no doubt, recognized:

(a) That war, though yet inevitable, should be diminished as much as possible;

(b) That to that end all peaceful means for settling international disputes should be favored and fostered among nations;

(c) That, excessive armaments being prejudicial to social betterment,

it is a pressing problem to find some better way for averting war than by their maintenance.[5]

But, in spite of the manifestation of these high ideas and purposes of humanity, if one looks at the facts as they really are, he will see that such ideas and purposes have not been expressed except under the implied condition that they should not oblige the Powers concerned to impose any restraint upon their particular aims. Each of them has some ground for increasing its armaments and other means of making war, as, for instance, to enlarge its domain by annexing or occupying a new piece of land, to preserve its acquired position of great Power in the international community, to keep in position to interfere with the affairs of another Power when advisable or useful in its particular ambition or interests.

In the second place, it seems unnecessary to add that some of the great Powers have in view though not expressly advancing them, certain peculiar reasons for not admitting arbitration as an *ordinary means* of settling international differences in the present state of the world's affairs. For example, Germany would be unwilling to submit to arbitration any important case in which she is concerned, since she thinks she is able to thrash it out with her enormous military force and strong alliances with other Powers with better chance of success than by bringing the case before the judges of the Hague Tribunal. Furthermore, arbitration without reservation, once admitted as the means for settling all international differences, who can state that circumstances may not arise of so extraordinary a character that questions like those

[5] Beside the convention for the peaceful settlement of international differences through the practice of arbitration, of mediation and good offices, the First Hague Conference also voted unanimously the following Declaration: "The Conference is of the opinion that the restriction of military charges, which are at present a heavy burden on the world, is extremely desirable for the increase of the material and moral welfare of mankind."

The Second Hague Conference not only adopted a new convention for the peaceful settlement of international differences, but also another declaration recognizing the principle of obligatory arbitration, and further, that certain differences, namely, those concerning the interpretation and the application of treaty stipulations, are, without reservation, referable to obligatory arbitration. Also a new Declaration relating to the reduction of military charges, as voted by the First Conference, was reaffirmed by the Second Hague Conference.

of Alsace and Lorraine would not be called into question and demand made for their reference to arbitral decision? * * *

Reasons and motives of the same or similar kind also explain why Austria-Hungary, Italy, Great Britain and other Powers do not desire to go practically very far on behalf of arbitration.

Austria-Hungary has just transformed her occupation of Bosnia and Herzegovina, *ex vi* the Treaty of Berlin, into an actual annexation of the two provinces.

Italy has no idea of a renunciation of Tripoli and Cyrenaica, although the treaty of peace signed at Lausanne contains no express clause recognizing her sovereignty over those provinces.

England, though a sincere friend and champion of peace, will cast her vote for arbitration within certain limits only. She cannot, on her part, renounce the territories acquired in Africa and Asia at the expense of the small Powers existing in those parts of the world. Besides, she knows that the great influence she has and exercises among the other nations is mostly due to a supreme British navy, sufficient to countervail and neutralize their forces. Accordingly, she understands that the enlargement of her navy is the best safeguard of humanity against a very great danger, even if it is an increase of the instruments of war.[6]

Furthermore, does any one pretend that the preponderance of influence of the Triple Alliance and the Triple Entente in Europe is based on principles of or reasons derived from international law and justice, or deny that it depends entirely upon the military strength of either side?

On the other hand, in the present state of international law, even relying entirely upon the impartiality of the Hague Tribunal, it is not yet assured that all the controversies of an international nature which may arise will be settled with a complete guarantee of justice to the parties concerned.

Lastly, it is to be borne in mind, that the so-called family of nations is not yet a reality, unless the mere juxtaposition and intercourse of the different nations, each guided in respect to its international relations by

[6] These views concur with those expressed in the *Review of Reviews* for February, 1914, on the same subject. On this side of the Atlantic, Chile, since the First International American Conference, has steadily dissented from any proposition respecting compulsory arbitration, because, it is said, of her occupation of Tacna and Arica.

its own and peculiar interests and ambitions, be accepted as such. They still hold to the same absolute conception of sovereignty which prevailed according to medieval theory. A sovereign state is, no doubt, one free from external control and, as such, entirely free to issue any commands over the whole community existing within its territory. Sovereignty is certainly an inseparable attribute of every independent state. Out of this absolute conception of sovereignty, each state assumes to be the sole judge of its acts and obligations, and that, accordingly, no restraint or obligation may be imposed upon it, except with its own previous and voluntary consent thereto.

In a general way and in particular relation to internal affairs, no objection can be raised to those propositions. But, on the other hand, the state being considered a part of the family of nations, such an absolute conception of sovereignty should have some limitation in order that it may be adjusted to the principles of justice, comity and humanity, upon which international law among civilized nations must be based. In this day and generation nearly all important occurrences, though they take place entirely within the territory of a single civilized state, cannot fail, in view of the close and uninterrupted relations of every kind existing between all the states, to interest the outside world.

If it is unfortunately true, that sovereignty may sometimes amount to absolutism or even to despotism as concerns the internal affairs of a state, it should, however, keep within the reasonable limits of justice in respect to external relations. Undoubtedly, this limitation admits in theory of no dispute; but in practice the sad truth leads to the contrary, that is to say, the extent of sovereignty is really measured by the military strength of each state. Hence the uncertainty, perhaps the lack, of a firm basis upon which the principles and rules of justice and humanity regulating international life may be secured. In so saying, I do not intend to do more than to point out a state of things which unfortunately exists as an insurmountable obstacle to the realization of the ideal of the friends of peace and to the effective progress of international law.

At this point, I may say that I entirely concur in the opinion of Sir Harry H. Johnston, when he wrote that the peace of Europe and of the Old World (why not the same of the New World?) will never be established on a firm basis and the principles enunciated at The Hague will

never be universally accepted until there is a final adjustment of spheres of influence among the great and small Powers of the Christian world, and among such great nations and well governed states as Japan, China, Siam, and Persia now are, or are likely to become.[7] Or, in other words, not until the day when the great Powers will make up their minds to prefer in international affairs the peaceful ways of justice and humanity instead of the still common resort to force, will the very great difficulty for the elimination of war be removed from among the civilized nations.

But the very question is, When will the great Powers feel willing to do this? So long as the present state of the world remains unchanged, it may be assumed that war will inevitably continue to be the final resort, as yet provided, when nations will not agree to a pacific solution of their controversies; consequently, the belief in a possible maintenance of general peace lacks at the present time all real foundation. Facts should be accepted as they really are. *Res habent sua fata.* The efforts of the friends of peace and the most sincere good will of a few nations will not suffice to accomplish now the best results in that direction. It is necessary to wait, to await the proper occasion for the solution of this most human problem.

The present state of relations among the civilized nations is the result of the continued labor of successive centuries. It stands at this time as it must stand. It cannot be changed by man's volition only, even supposing his aims and purposes be of the best. No direct attack can as yet change the attitude of the several nations regarding matters of international concern. Therefore, the only advisable or possible way to accomplish the desired results is, as has so often been suggested, to proceed by adopting parts of the *statu quo* to the new order of things which is intended to be constructed.

To my mind success is to be expected from the people of the nations rather than from their governments. In the civilized states of today the will of the people, if reasonable, becomes solidified into public opinion, and the pressure of public opinion sooner or later will lead the respective governments to carry out the measures desired by the people. Accordingly, what is to be done is to create a general feeling of the strongest common conviction, derived from the principles of international law, to

[7] See *Review of Reviews* for February, 1914, p. 106.

be disseminated more and more among the civilized nations, so that they may be naturally led to look upon the solution of international conflicts through the peaceful adjustments of reason and justice, in preference to the violent methods of war. In other words, what the cause of peace needs most is to create an international atmosphere, wherein good will and justice will be felt and desired everywhere and increase and develop until all governments and all peoples are enveloped in them.

Of all the means of attaining this end one exists which, although its progress is slow, is surely effective in leading nations to a safer policy respecting international peace. I mean the increase of associations and societies especially devoted not only to the propaganda of the benefits of peace, but also to the dissemination of the general and common principles of international law throughout the several countries, in order that their peoples may acquire a common conscience, that there may always or almost always be for the settlement of controversies arising between nations some peaceful means, which may be substituted for a violent resort to arms which above all is prejudicial to the well-being of the peoples themselves. If the peoples were convinced of this truth, they would be only too ready to support a movement which would rid them of such an enormous misfortune. In Europe there have long since been established numerous associations of this kind which work in that direction. In America peace associations are unfortunately not yet so numerous as might have been hoped and expected, but they are surely increasing every day.

Recently there has been founded at Washington "The American Institute of International Law" which, in co-operation with similar societies existing or expected to be created in all the American countries, proposes to provide in the best possible way for the development and dissemination of a knowledge of the rules of international law in the American continent.

As declared by its statutes, the object of The American Institute of International Law is the following:

(a) To contribute toward the development of international law and to bring about the acceptance of its general principles by the nations of the American Continent;
(b) To encourage the scientific and methodic study of international

law, to make known its principles, and to encourage its knowledge and its application in the conduct of international relations;

(c) To contribute to a clearer conception of international rights and duties, and to the creation of a common feeling of international justice among the people of the American Continent;

(d) To strive for universal acceptance of the principle of peaceful settlement of international disputes among American nations.

The above and what has been already sketched in a previous note giving the aims and purposes of the proposed Institute,[8] if thoroughly and properly accomplished, is, to my mind, all that need be done in this direction. By endeavoring to establish the principles and to determine the rules of international law, which are today vague or ill-defined and even non-existent, the Institute will aim to meet the exigences of the life of nations and the idea of justice and solidarity.[9]

Now, with more particular reference to arbitration and other means of preserving peace, if it is really impossible to think at this time of a general treaty of obligatory arbitration among the states of the world, it would seem to be, nevertheless, possible for the Third Hague Conference to adopt a few measures which appear to be of the greatest benefit to the progress of peaceful settlement among the nations as, for example:

(1) The Powers might declare, if they really so desired, that no declaration of war shall henceforth be made without a previous attempt to settle the difference by arbitration;

(2) They might agree to a list of cases, as numerous as possible, which should hereafter be referred to obligatory arbitration;

(3) The International Court of Arbitral Justice could be definitively organized and placed in operation.

(4) An agreement might be signed by the Powers for the limitation of armaments.

Undoubtedly a sure step would have been taken in favor of world peace, if the Powers would consent to agree that no declaration of war shall be made without a previous attempt to arbitrate. A provision with this end in view is already contained in the constitutional laws of some American states. I quote from that part of the Brazilian Constitution which deals with the powers of the National Congress: "To authorize

[8] In this JOURNAL, January, 1913, p. 163 *et seq.*

[9] *Ibid.*, p. 165.

the government to declare war when arbitration has failed, or cannot take place."[10]

It is not intended by this means to suppress war, but merely to create a means of hindering or preventing it.

The suggestion contained in the second proposition above, has, as is known, already been considered by the Second Hague Conference and is included among the declarations which it voted. It would indeed be a great advantage if the conflicting nations should become accustomed to resort to compulsory arbitration, even if only for the few cases expressly mentioned in the list agreed to by the Hague Conference.

As to the third of the foregoing suggestions, it is strongly hoped and greatly expected that the recommendation of the Second Hague Conference on this point will be converted into a fact by the next Hague Conference. In the present state of every day relations between civilized nations, the usefulness of an International Court of Arbitral Justice is self-evident and clearly justified. It is not necessary to add to what has been already said in support of the proposed court during its consideration by the Second Hague Conference. The mere existence of such a court will furnish the opportunity and a motive for the increase of cases to be referred to arbitral settlement. It cannot be believed or admitted that the states which have formally recognized the need of such a court, are, nevertheless, not willing or able to arrive at a satisfactory agreement regarding the selection, the qualifications, and the number of the judges who shall compose it.

As to the fourth and last measure proposed, I dare express my own feeling in regard to it. The present growth of armaments is not only an enormous burden which is hindering the development of nations and the

[10] During the meeting of the *Third International American Conference* at Rio de Janeiro, 1906, which I had the honor of attending as a delegate of Brazil, I had occasion to suggest a clause on this subject as follows:

"Arbitration is the ordinary way of settling international differences, which it might not have been possible to settle by diplomacy; consequently, no state can declare war or carry on any act of hostility without previously offering to settle the difference by arbitration and the offer has been refused.

"A state which proceeds to the contrary will have no right to require a third state to keep entirely neutral regarding the said contention."

Amaro Cavalcanti, *Terceira Conferencia Internacional Americana, Trabalhos*, p. 86.

welfare of individuals, but it constitutes at the same time, an increasing difficulty to the maintenance of peace.

If it is true, as has so often been written, that no single nation can take the initiative in reducing its armament because in the present state of the world such a step might jeopardize its existence, it is equally true that this difficulty would disappear if the so-called great Powers would make up their minds to enter into an agreement for the reduction or limitation of armaments. But, if they are not yet willing to go so far, they could, at least, stop in their mad race for armaments by not increasing so rapidly these ruinously expensive preparations for war. It is a great mistake to imagine that such huge instruments of war are not a serious obstacle to the peace of nations.

In closing this article, I shall only add that, for my part, and as a friend of general peace, should the small measures of progress above suggested be accomplished by the next Hague Conference, I would feel entirely satisfied and be most happy for the advance made by the great Powers of the world.

AMARO CAVALCANTI.

THE WORK OF THE JOINT INTERNATIONAL COMMISSION ON PANAMA CLAIMS

The questions presented to the Joint International Commission appointed under the terms of Articles VI and XV of the treaty between the United States of America and the Republic of Panama, ratified February 26, 1904, were of so unusual a character that a brief statement of the principles formulated by the Commission will probably be of interest to students of international law.

The provisions of the treaty under which the work of the Commission was organized read as follows:

Article VI

The grants herein contained shall in no manner invalidate the titles or rights of private land holders or owners of private property in the said zone or in or to any of the lands or waters granted to the United States by the provisions of any article of this treaty, nor shall they interfere with the rights of way over the public roads passing through the said zone or over any of the said lands or waters unless said rights of way or private rights shall conflict with rights herein granted to the United States in which case the rights of the United States shall be superior. All damages caused to the owners of private lands or private property of any kind by reason of the grants contained in this treaty or by reason of the operations of the United States, its agents or employees, or by reason of the construction, maintenance, operation, sanitation and protection of the said Canal or of the works of sanitation and protection herein provided for, shall be appraised and settled by a joint Commission appointed by the Governments of the United States and the Republic of Panama, whose decisions as to such damages shall be final, and whose awards as to such damages shall be paid solely by the United States. No part of the work on said Canal or the Panama Railroad or on any auxiliary works relating thereto and authorized by the terms of this treaty shall be prevented, delayed or impeded by or pending such proceedings to ascertain such damages. The appraisal of said private lands and private property and the assessment of damages to them shall be based upon their value before the date of this convention.

ARTICLE XV

The joint commission referred to in Article VI shall be established as follows:

The President of the United States shall nominate two persons and the President of the Republic of Panama shall nominate two persons and they shall proceed to a decision; but in case of disagreement of the Commission (by reason of their being equally divided in conclusion) an umpire shall be appointed by the two Governments who shall render the decision. In the event of the death, absence or incapacity of a Commissioner or Umpire, or of his omitting, declining or ceasing to act, his place shall be filled by the appointment of another person in the manner above indicated. All decisions by a majority of the Commission or by the umpire shall be final.

The first difficulty which confronted the Commission immediately after its organization was the clause in Article VI of the treaty, reading as follows: "The appraisal of said private lands and private property and the assessment of damages to them shall be based upon their value before the date of this convention."

It is evident from the contents of the instrument, as well as from the circumstances surrounding the negotiation of the treaty, that this clause was intended to prevent speculative manipulation of the lands necessary for the construction of the Canal and the auxiliary works. At the time of the ratification of the treaty neither the officials of the United States Government nor the representatives of Panama foresaw that the United States Government would subsequently avail itself of the broadest possible interpretation of the clauses of the treaty relating to the acquisition of the title to all land situated within the Canal Zone.

In the Act of August 24, 1912, providing for the permanent government of the Canal Zone, the President was authorized under section 3

to declare by Executive order that all land and land under water within the limits of the Canal Zone is necessary for the construction, maintenance, operation, sanitation, or protection of the Panama Canal, and to extinguish by agreement when advisable, all claims and titles of adverse claimants and occupants. Upon failure to secure by agreement title to any such parcel of land or land under water the adverse claim or occupancy shall be disposed of and title thereto secured in the United States and compensation therefor fixed and paid in the manner provided in the aforesaid treaty with the Republic of Panama, or such modification of such treaty as may hereafter be made.

Acting under the authority thus vested in him, President Taft on December 5, 1912, issued the following executive order:

> By virtue of the authority vested in me by the Act of Congress entitled "An Act to provide for the opening, maintenance, protection and operation of the Panama Canal and the sanitation and government of the Canal Zone," approved August 24, 1912, I hereby declare that all land and land under water within the limits of the Canal Zone are necessary for the construction, maintenance, operation, protection and sanitation of the Panama Canal, and the Chairman of the Isthmian Canal Commission is hereby directed to take possession, on behalf of the United States, of all such land and land under water; and he may extinguish, by agreement when practicable, all claims and titles of adverse claimants to the occupancy of said land and land under water.

In January, 1913, the President of Panama appointed the Honorable Federico Boyd, a former President of the Republic, and the Honorable Samuel Lewis, a former Minister of Foreign Affairs, to represent the Republic of Panama on the Commission. At the same time President Taft appointed Dr. Roland P. Falkner, of Washington, D. C., and Dr. L. S. Rowe, of the University of Pennsylvania, to represent the United States. The American Commissioners arrived on the Isthmus in February and on the first of March the first formal meeting of the Commission was held. The Commission found itself confronted by an altogether exceptional and extraordinary situation. It was the evident intent of the treaty of February 26, 1904, to extend the broadest possible protection to the property rights of the inhabitants of the Canal Zone. The desire on the part of the United States to refrain from any action which would undermine or otherwise injure the private property rights was further emphasized by the instructions issued by the President to the Secretary of War under date of May 9, 1904, in which emphasis was laid on the fact that "The inhabitants of the Isthmian Canal Zone are entitled to security in their persons, property and religion, and in all their private rights and relations. They should be so informed by public announcement. The people should be disturbed as little as possible in their customs and avocations that are in harmony with principles of well ordered and decent living."

The most important question confronting the Commission related to the status of settlers or occupiers of public lands in the Canal Zone, who

went upon such lands prior to the conclusion of the treaty of February 26, 1904. Under the Colombian law which prevailed in the Canal Zone prior to the independence of the Republic of Panama, and which continued in force while the Republic of Panama exercised jurisdiction over the Canal Zone, occupiers of, or squatters on, public lands, were entitled to compensation for the value of their improvements if for any reason they were ousted from such lands. Counsel for the United States strenuously contended that the transfer of the political jurisdiction over the Canal Zone to the United States destroyed any rights that might have been acquired by settlers or occupiers under the Colombian law. It was argued that under the general principles of American jurisprudence unauthorized occupiers of public lands are mere trespassers, and that a trespass cannot be made the foundation of a right. Great legal acumen was displayed by counsel both for the United States and the parties in interest, and after an exhaustive argument before the Commission and prolonged deliberation within the Commission the conclusion was finally reached by unanimous vote that settlers or occupiers of public lands in the Canal Zone, who went upon such lands prior to the conclusion of the treaty of February 26, 1904, were entitled to compensation for the value of the improvements which they had made on such lands. The opinion establishing this principle reads as follows:

With reference to the status of such occupiers, it is clear that under the provisions of the Laws of the United States of Colombia and subsequently of the Republic of Panama, cultivators on public lands acquire a right to compensation for improvements, which rights were not divested by anything contained in the treaty of November 18, 1903,[1] or by the change of sovereignty affected by that treaty.

The rights of occupiers on public lands of the United States of Colombia to compensation for improvements made thereon, are governed by law No. 48 of 1882, which contains the following provisions (Art. V):

> Cultivators settled on public lands with dwelling, and cultivating such lands, shall be considered as possessors in good faith of such lands, and shall not be deprived of the possession of such lands, except by due process of law. (Art. 2.)
>
> In case a cultivator should be deprived of his property through due process of law,

[1] Attention is called to the rule of the Commission, dated August 4, 1913, whereby in all matters affecting the rights of private parties, the treaty between the United States of America and the Republic of Panama is to be referred to as of the date of the exchange of ratifications, to-wit, February 26, 1904.

he shall not be dispossessed of the land occupied by him without first being indemnified to the extent of the value of the improvements made on the land, as possessor in good faith of the land.

Improvements shall consist of clearing of the land, embankments, cultivation and dwellings, the value of which shall be appraised by experts, as provided for in the Judicial Code of the nation or of the state in which the adjudicated land is located.

Until the value of such improvements shall have been paid, there shall not exist against the possessor any action for ejectment from the land.

In the case of the United States *v.* Andrade,[2] the Supreme Court of the Canal Zone had under consideration the status of an occupier of public lands of the United States of Colombia and subsequently of the Republic of Panama. In passing on the rights of such occupier, the lower court (Circuit Court of the Second Judicial District) said:

The fact that the defendant remained in undisturbed possession of the land for such a length of time, and that he has improved the same, would certainly give him a moral right, if indeed he has not a legal one, for any and all improvements that he has placed on the land.

On appeal to the Supreme Court of the Canal Zone, the court,[3] after citing the provisions of Articles 2 and 5 of law No. 48, of 1882, said:

The defendant, besides being considered to all effects by law as a possessor in good faith of the land occupied by him, and having occupied it undisturbedly with the knowledge and consent of the Colombian authorities, is entitled to the rights provided for by Article 739 of the Civil Code,[4] which article provides for the payment of the improvements made on the land.

The Commission rules, therefore, that in all those cases in which rights accrued prior to November 18, 1903, to occupiers or settlers on public lands, such rights were not divested by the Treaty of November 18, 1903,[5] and that such settlers or occupiers are entitled to compensation for such rights as have accrued.

[2] 1 Canal Zone Supreme Court Reports, 64.

[3] *Ibid*, 75.

[4] Art. 739. The owner of land upon which another person without his knowledge shall have built, planted or sowed, shall have a right to make the building, planting or sowing his own, upon the compensation prescribed in favor of possessors in good or bad faith in the title of Revendication, or to oblige the person who built or planted to pay him a just price for the land with legal interest, for all the time he may have had possession thereof, and the one who sowed to pay him the rental and indemnify him for damages.

If the building, planting or sowing shall have taken place with the knowledge and consent of the owner of the land, he shall be obliged, in order to recover it, to pay the value of the building, planting or sowing. (Civil Code of Panama, p. 166.)

[5] Attention is called to the rule of the Commission, dated August 4, 1913, whereby in all matters affecting the rights of private parties, the treaty between the United

Another question which aroused much interest, and which involved the rights of a large number of persons, related to the status of those settlers or occupiers of public lands who went upon such lands subsequent to the ratification of the treaty of February 26, 1904. The main principle here involved was whether the transfer of political jurisdiction over the Canal Zone to the United States through the operation of the treaty had abrogated the Colombian Cultivators' Law of 1882.

The question was of such importance that the Commission deemed it necessary not only to enter into a most careful consideration of every aspect of the situation, but also to file a detailed opinion, setting forth the reasons for its decisions. The conclusions arrived at maintain the right of the inhabitants of the Canal Zone to compensation for any improvements which they may have made on public lands, even if such occupancy began subsequent to the ratification of the treaty of 1904. The opinion of the Commission establishing this principle reads as follows:

It was said by the Supreme Court of the United States, in the case of the United States *v.* Auguizola (1 Wall. 352), in passing on certain property rights involved in the territory ceded by Mexico to the United States in 1848:

> They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulation of the treaty, the law of nations, the laws, usages and customs of the former government, the principles of equity, and the decisions of the Supreme Court, so far as they are applicable. They have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded.

It is in this spirit that the Commission approaches the question as to the status of occupiers on public lands subsequent to 1903, who were not occupying such lands under leases or revocable licenses issued by the Isthmian Canal Commission. We are fully cognizant of the fact that the courts of the United States hold that occupiers of public lands acquire no rights.

The only question which presents itself is whether this rule of law is applicable to conditions in the Canal Zone.

States of America and the Republic of Panama is to be referred to as of the date of the exchange of ratifications, to-wit, February 26, 1904.

It is a general principle of international law, that:

When political jurisdiction and legislative power over a territory are transferred from one sovereignty to another, the municipal laws of the territory continue in force until abrogated by the new sovereign.

This principle was strongly emphasized with reference to the Canal Zone in the instructions from the President of the United States to the Secretary of War, under date of May 9, 1904. The pertinent portion of these instructions reads as follows:

The inhabitants of the Isthmian Canal Zone are entitled to security in their persons, property and religion, and in all their private rights and relations. They should be so informed by public announcement. The people should be disturbed as little as possible in their customs and avocations that are in harmony with principles of well ordered and decent living.

The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the Canal Zone and in other places on the Isthmus over which the United States has jurisdiction until altered or annulled by the said Commission, but there are certain great principles of government which have been made the basis of our existence as a nation, which we deem essential to the rule of law and the maintenance of order, and which shall have force in said zone. The principles referred to may be generally stated as follows:

"That no person shall be deprived of life, liberty or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence; that excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offence, or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime: that no bill of attainder or ex post facto law shall be passed; that no law shall be passed abridging the freedom of speech or of the press, or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting the establishment of religion or prohibiting the free exercise thereof."

In the consideration of this question, the Commission has also given weight to certain principles, which, in view of the exceptional conditions prevailing in the Canal Zone, acquire much weight.

The Canal Zone was acquired for the definite purpose of constructing a great international highway. To accomplish this purpose the United States acquired complete control over this territory and has exercised a vigilant police power.

The plainest principles of equity required that, in a territory where

the inhabitants had been accustomed, from time immemorial, to go upon public lands for the purpose of cultivating small tracts in order to secure a livelihood, the United States Government give peremptory notice that "squatting" would not be permitted on the public lands of the United States, and that such occupiers would be removed without compensation.

It is a further fact worthy of consideration that no attempt was made clearly to define the precise boundaries of public lands, and that in most cases there was nothing to indicate to the claimants, now under consideration, whether their improvements were being made on public or private lands. The fact that the agents of the United States did not know the exact limits of such public lands is indicated by the fact that in some instances they undertook to issue leases for lands which belonged to private parties.

Not only has there been some uncertainty on the part of the government as to the precise boundaries of public lands, but there has also existed much confusion in the public mind as to the limits of public property, because of the fact that by the frequent acquisitions by the United States, either through purchase or expropriation proceedings, land formerly known as private land has been converted into public land. These uncertainties would greatly complicate the situation, if a rule were adopted denying to occupiers of public lands, rights which have been recognized with respect to occupiers of private lands.

In arriving at any conclusion with reference to occupiers of the public lands of the United States within the Canal Zone, the exceptional governmental and legal conditions prevailing in this strip of territory must never be lost sight of. In this connection the following considerations deserve particular attention:

First. The laws of the United States do not extend *ex proprio vigore* to the Canal Zone. Some positive act of the Government of the United States is necessary in order to extend the operation of such laws. The Commission finds no trace of any positive action of the United States to indicate that the Colombian law governing the rights of cultivators to compensation for improvements (law No. 48 of 1882) was to be regarded as abrogated. In the case of the United States *v.* Andrade (Canal Zone Supreme Court Reports, Vol. 1, p. 69) the Supreme Court of the Canal Zone had occasion to pass on the rights accruing under this law. It is true that the case involved the question of compensation for improvements made prior to American occupation, but if the law continued in force subsequent to such occupation the principles to be applied remain the same. In the course of its opinion in this case the Supreme Court said:

> In regard to the rights of settlers upon public lands, Law 48, of 1882, contains, besides Art. 2, above quoted, Art. 5, which reads as follows:
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> Art. 5 of Law 48 of 1882: "In case a cultivator should be deprived of his property

through due process of law, he shall not be dispossessed of the land occupied by him without first being indemnified to the extent of the value of the improvements made on the land, as possessor in good faith of the land.

"Improvements shall consist of clearing of the land, embankments, cultivation and dwellings, the value of which shall be appraised by experts, as provided for in the Judicial Code of the Nation or of the State in which the adjudicated land is located.

"Until the value of such improvements shall have been paid, there shall not exist against the possessor any action for ejectment from the land."

The defendant, besides being considered to all effects by law as a possessor in good faith of the land occupied by him and having occupied it undisturbedly (?) with the knowledge and consent of the Colombian authorities is entitled to the right provided for by Art. 739 of the Civil Code, which article provides for the payment of the improvements made on the land.

Second. Long before the institution of these proceedings before the Joint Land Commission, the right of occupiers to compensation for improvements made on private lands was generally recognized by the Government of the Canal Zone. In the instructions issued by the Chairman and Chief Engineer of the Isthmian Canal Commission in Circular No. 301, dated January 7, 1910, we find the following clause:

Should there be any buildings or crops located within the area to be covered by the waters of Gatun Lake and outside of the Canal channel upon lands belonging to private parties, the owners will be paid the actual value of such buildings or crops at the time the water reaches the property.

In other words, the Government of the Canal Zone has recognized, and continues to recognize the right to compensation of occupiers on private lands, a right not founded upon any doctrine of American law, for most of such persons, under standards of American law are mere trespassers on private property, and such trespass cannot give rise to a right. If, therefore, the right of such persons to compensation is recognized, such right can only rest on one or both of the following principles: (a) Article 739 of the Civil Code of Panama; (b) a broad spirit of equity in dealing with the exceptional conditions prevailing on the Canal Zone.

In short, persons who under American law would be considered as mere trespassers on private property, have received repeated and continuous recognition of their right to compensation for their improvements. If Article 739 of the Civil Code of Panama remains in force with reference to occupiers on private lands, it would seem but just and equitable that Article 5 of the Cultivators' Law (Law No. 48 of 1882) should be recognized as remaining in force with reference to the right to compensation for improvements made on public lands, thus preserving to such occupiers the same rights which they enjoyed prior to the treaty of November 18th, 1903.

Third. A further circumstance to which the Commission has given due weight is the fact that the instructions of the President of the United

States, dated May 9, 1904, after prescribing with much emphasis, that the people of the Canal Zone "should be disturbed as little as possible in their customs and avocations that are in harmony with principles of well-ordered and decent living," directs that:

> The laws of the land with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the Canal Zone and other places on the Isthmus over which the United States has jurisdiction, until altered or annulled by the said commission.

These instructions clearly indicate that the Government of the United States was not only prepared to assure to the people of the Canal Zone the full and undisturbed enjoyment of their property rights, but was anxious to avoid any action the effect of which would be to destroy any property or property rights which were recognized by the laws, customs and traditions of the people as they existed prior to the treaty of November 18, 1903.

The fact that the government of the Canal Zone is distinctively an executive government, and that the President of the United States, in whom full authority over the Canal Zone was vested by the Act of April 28, 1904, expressed himself unequivocally with reference to the preservation of the property rights of the people, together with the further fact that there is nothing to indicate any intent to abrogate Article V of the Cultivators' Law of 1882, but that on the contrary there are many circumstances which tend to show that it was intended that this article should remain in force, justify the conclusion that any rights which may have accrued by reason of the operation of Article V of Law No. 48 of 1882, are entitled to full consideration by this Commission.

Reasoning, therefore, from the constitutional and legal status of the Canal Zone, the exceptional situation created by the fact that the decision to remove inhabitants from the Zone was not made until nearly ten years after the conclusion of the treaty of November 18, 1903, and taking into consideration the principles of law which govern property rights in this territory, the Commission has reached the conclusion that Article V of the Cultivators' Law of 1882, in force in the Canal Zone at the time of the conclusion of the treaty of November 18, 1903, has not been abrogated by any action of the United States and still remains in force, and that, therefore, those persons who, complying with the provisions of this act, have made improvements on public lands, are entitled to compensation for the value of such improvements, and awards will be made accordingly.

There still remains for determination, the status of those persons who went on public lands after the ratification of the treaty of February 26, 1904, and who, subsequent to such occupancy, accepted licenses issued by the Isthmian Canal Commission.

With reference to claimants included in this category, it is evident that if they had acquired any rights at the time of the acceptance of

these licenses, such acceptance did not divest them of the rights which had accrued prior to the date of the issuance of the license. Their claims, therefore, so far as they relate to rights accrued prior to the acceptance of the licenses, are within the jurisdiction of the Commission, and should be adjudicated accordingly.

The third difficult and important question which confronted the Commission related to the status of persons who had leased either lands or town lots from the Isthmian Canal Commission. The leases issued by the Commission were in the nature of revocable leases or licenses. In all cases in which tenants entered upon lands under such leases, the Commission held that their status must be governed by the terms of the lease, and that the Commission was without jurisdiction to grant compensation for any damages that might ensue because of the termination of the lease. The opinion of the Commission passing on this point reads as follows:

> In determining the limits of jurisdiction of the Joint Commission established by Articles VI and XV of the Treaty between the United States of America and the Republic of Panama, concluded November 18, 1903, it is essential to bear in mind that this Commission was created for the purpose of discharging an international obligation, and not with the intent of placing under its jurisdiction questions of a purely municipal character. It is clear that when a person has accepted a revocable lease or license from the United States Government, such lease or license is accepted subject to the powers specifically reserved by the United States Government or its agent, the Isthmian Canal Commission, to revoke the lease or license, and to require the removal of any building erected thereon. The relationship is a purely municipal one, and involves nothing in the nature of an international obligation to be discharged under the treaty.
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> We have, therefore, reached the conclusion that it is not within the province of the Joint Land Commission to take cognizance of claims arising out of the revocation of revocable leases or licenses issued by the Isthmian Canal Commission. Such claims have no organic relation to the grants contained in the treaty, nor to the international obligation which the United States has agreed to discharge under the treaty; and for the adjudication of all such claims, the claimants must seek a remedy through the procedure afforded by municipal laws.

In those cases, however, in which persons entered upon lands prior to the time of the acceptance of leases or revocable licenses from the Isthmian Canal Commission, a different question presented itself for the

consideration of the Commission. In passing on the claims of such persons the Commission kept constantly in mind the terms of Article VI of the treaty of February 26, 1904, which reads as follows: "The grants herein contained shall in no manner invalidate the titles or rights of private landholders or owners of private property in the said Zone."

After the fullest possible consideration of the question, the Commission reached the conclusion that when the United States, through the acts of its agents, deprived persons of rights which had accrued under the Colombian Cultivators' Law of 1882, such acts constitute a damage for which the party injured has a right to compensation. As was said by the Commission in the course of its report:

> Those persons who prior to the issuance of leases or licenses had acquired rights to compensation under the Colombian Cultivators' Law were told by the agents of the United States that unless they accepted these leases they would be liable to eviction. The Commission unanimously reached the conclusion that the agents of the United States in attempting to substitute a revocable license which deprived the cultivator of all right to compensation for the definitive rights which had accrued under the Cultivators' Law, inflicted a damage for which the party injured has a right to compensation. The fact that no compensation was made at the time these poor peasants were required to accept the revocable licenses, does not diminish the damages which they suffered, and gives them a right to compensation under the terms of Article VI of the treaty ratified February 26th, 1904.
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> It may not be amiss in this connection to say a word concerning the conditions under which persons occupying public lands as cultivators were required to accept the revocable licenses issued by the Isthmian Canal Commission. Practically all of these people belong to the humblest class, who were not in a position to defend their rights. They were confronted with the alternative of accepting the leases or being evicted from their homes. It is safe to say that not five per cent of those who were required to accept such leases knew the contents of the instrument they were signing, either because of their illiteracy or because of a lack of acquaintance with the English language, in which all the leases were printed. While these facts do not have any bearing on the strict interpretation of the law governing the rights of such cultivators, they should be given weight in arriving at any general estimate of the equities of the situation.

A question of a similar character, and affecting the rights of a large number of inhabitants of the Canal Zone, was presented by the status of lessees by building lots in some of the municipalities of the Canal Zone.

Under the old Colombian system many of the municipalities owned most of the land within the limits of the town, which land was leased to the inhabitants. The difficulty of determining the precise status of lessees of town lots under the Colombian regime was increased by reason of the fact that under the Executive order of March 13, 1907, the municipalities of the Canal Zone were abolished, and the country divided into a series of administrative districts.

So many difficult and delicate legal questions are involved in the determination of the status of such tenants that the only way to make the situation intelligible is to reproduce the opinion of the Commission on the leading case, which was that of a man by the name of Juan Sotillo, a resident of the town of Gorgona, who leased a town lot from the municipality of Gorgona long before American occupation. The question was presented to the Commission in the form of a demurrer to the jurisdiction of the Commission filed by counsel for the United States. The opinion of the Commission on this demurrer, which involves the status of tenants of town lots, reads as follows:

On June 23rd, 1913, counsel for the United States filed a demurrer to the jurisdiction of the Commission in the matter of the claim of Juan Sotillo, which claim is for property owned in the town site of Gorgona. In this plea to the jurisdiction of the Commission, counsel for the United States contends that any award made to the claimant—

"Would constitute a departure from the powers delegated to the Joint Land Commission by the high contracting parties, in the convention between the United States of America and the Republic of Panama, ratifications of which were exchanged at Washington on February 26th, 1904, in that the claimant had suffered no damage by reason of the grants contained in said convention, or by reason of the operations of the United States of America within the meaning of Article VI of said treaty, as it is shown on the face of the claim filed that the use and occupation of the land upon which the alleged improvements were located arose out of a private agreement, license or contract between the United States of America and the claimant.

"It is denied that this claimant has any rights in hand to the property described in the statement of claim against the United States of America, except such rights as are derived by him under the terms of Isthmian Canal Commission lease No. 4093, cancelled the first day of April, 1911."

Briefly stated, the position taken by counsel for the United States is that the status of this claimant is determined by the terms of the Isthmian Canal Commission lease No. 4093, and that under the terms of such lease no rights could accrue within the contemplation of Article VI of the

treaty ratified February 26, 1904. Furthermore, that the rights of this claimant must be adjudged exclusively by the terms of the lease, and that any rights which may have accrued prior to the issuance of such lease are divested by its acceptance and cannot, therefore, receive the consideration of this Commission.

The questions raised by this plea are so important, involving the status of most of the claimants in the town of Gorgona, that it becomes necessary to enter into a detailed analysis of the situation.

The legislation of the United States of Colombia governing the organization and powers of municipalities, was characterized by a broad spirit of liberality in granting to such municipalities the ownership of lands included within the municipal district, and in allowing to local authorities wide discretionary power to sell or rent the municipal lands thus granted. Provisions to this effect are to be found in the following laws:

(a) Article No. 3 of Law No. 2, of March 6, 1832.
(b) Article No. 177 of Law No. 1, of May 18, 1834.
(c) Article No. 26 of Law No. 3, of June 13, 1844.
(d) Article 18 of the Law of October 22, 1855, of the sovereign State of Panama.
(e) Articles 1 to 6 inclusive, of the Law No. 23 of December 31, 1867.
(f) Articles 238, 240 and 248 of Law No. 149 of December 13, 1888.

Gorgona was recognized as a parochial district prior to 1855. It was organized as a municipal district by the law of September 12, 1855, of the sovereign State of Panama. From that date, Gorgona enjoyed all the rights and powers granted to municipalities under Colombian law.

In 1886 the town of Gorgona was destroyed by fire. In order to meet the emergency, the civil and military governor of the National Department of Panama, Ramón Santo Domingo Vila, issued the decree of March 16, 1886. This decree, which was intended to facilitate the reconstruction of Gorgona, contains the following provisions:

ARTICLE III. Former occupiers of town lots shall have preference in the granting of permits for the reconstruction of their houses on such lots, or in case it is impossible to grant to them permits for their former locations, owing to the change of the town plan, new lots, as near as possible to their old locations, shall be assigned.

ARTICLE IV. If, ninety days after the granting of a permit, the person to whom such permit has been granted has not undertaken the work of construction, the permit shall be deemed to be cancelled.

ARTICLE V. The rights arising out of the granting of a permit cannot be transferred without the approval of the authority granting such permit.

ARTICLE VI. A license for the use of a town lot does not give title to the lot occupied, and such permit must be renewed every five years.

ARTICLE VII. The municipality of Gorgona shall collect, at the time of the granting of the permit, a fee, which shall not exceed fifty (50) centavos for every square meter of land for which permits have been granted, and an annual rental of forty (40) centavos per square meter, to be paid quarterly in advance. The revenue from this

source shall be applied exclusively to the construction and preservation of the public buildings and barracks in the District of Gorgona.

ARTICLE VIII. The owners of houses which were not destroyed by fire, or which were erected thereafter, shall pay the annual rental referred to in the preceding article, and the owners of such houses are required to file with the authorities of the District of Gorgona a statement as to the area of the town lots which they occupy and the exact boundaries of such lots.

Less than three years after the issuance of this decree (December 3, 1888) the Republic of Colombia enacted a comprehensive law governing the organization and powers of municipalities. This was the law in force at the time of the acquisition of the Canal Zone by the United States. It provides (Art. 248) that the property of the former municipal districts be transferred to the reorganized municipalities. Furthermore, all vacant lands, and all lands of which there were no known owners, if situated within the limits of the municipality, are declared to be the property of the municipality.

This law also clearly recognizes the power of the municipality to alienate town lots within its limits, and, under certain circumstances, makes such alienation mandatory. Article 244 of the act of December 3, 1888, reads as follows:

Every town lot belonging to the municipality, which is situated within the limits of the town and which is not necessary for some public use, shall be sold in accordance with established procedure.

In order to protect the rights of those who had prior to 1888, rented town lots from the municipality, the Colombian Congress passed Law No. 50 of November 6, 1894, which provides (Article V):

When town lots belonging to the municipality and situated within its limits are sold, those persons who have erected buildings on such lots shall, all other things being equal, enjoy the preference in the adjudication of such lots. If, however, the owner of the building does not desire to purchase the lot at the highest price bid at public auction, his rights shall be determined by the application of Articles 739, 966 and 970 of the Civil Code.

The three articles of the Civil Code herein referred to provide:

ARTICLE 739. The owner of land upon which another person, without his knowledge, shall have built, planted or sowed shall have a right to make the building, planting or sowing his own upon the compensation prescribed in favor of possessors in good or bad faith in the Title of Revendication, or to oblige the person who built or planted to pay him a just price for the land with legal interest for all the time he may have had possession thereof, and the one who sowed to pay him the rental and indemnify him for damages.

If the building, planting or sowing shall have taken place with the knowledge and consent of the owner of the land, he shall be obliged, in order to recover it, to pay the value of the building, planting, or sowing.

ARTICLE 966. A defeated bona fide possessor is also entitled to an allowance for the useful improvements made before the answer to the suit.

By useful improvements shall be understood only such as shall have increased the market value of the thing.

The person seeking the revendication, shall choose between the payment of the value thereof at the time of the restitution of the works of which the improvements consist, or the payment of the increased value of the thing at said time due to the said improvements.

With regard to the works done after the suit was answered, the bona fide possessor shall have the rights only which are granted in the last paragraph of this article to a possessor in bad faith.

The possessor in bad faith shall not be entitled to any allowance for the useful improvements referred to in this article.

But he may take with him the materials of which said improvements consist, provided that they can be removed without damage to the thing recovered, and that the owner refuses to pay him the price which such materials would be worth after their separation.

ARTICLE 970. When there shall be due the defeated possessor a balance by reason of expenses and improvements, he may retain the thing until the payment is made, or security to his satisfaction is given.

It is evident, therefore, that the lessors of town lots belonging to the municipality of Gorgona acquired certain definitive rights under Colombian and Panamanian law, and the question arises whether any rights thus acquired were divested or in any way affected by: (1) ordinances or resolutions of municipality of Gorgona, passed subsequent to American occupation; (2) revocable leases or licenses issued by the Isthmian Canal Commission.

Resolutions and ordinances of the municipality of Gorgona

The resolutions and ordinances of the municipality of Gorgona relating to the leasing of municipal property are as follows:

(a) Resolution No. 5 of the municipal council of Gorgona, dated March 20, 1905.
(b) Ordinance No. 2 of the municipality of Gorgona, dated February 27, 1907, amending resolution No. 5, of March 20, 1905.
(c) Ordinance No. 8 of the municipality of Gorgona, dated May 17, 1905.
(d) Ordinance No. 1 of the municipal council of Gorgona, dated February 27, 1907, amending ordinance No. 8 of May 17, 1905.

The resolution of the municipal council, dated March 20, 1905 (No. 5), together with the amending ordinance of February 27, 1907 (ordinance No. 2), relate to the rental of town lots, whereas ordinance No. 8, dated May 17, 1905, and ordinance No. 1, dated February 27, 1907, and approved February 28, 1907, evidently relate to the leasing of agricultural lands. For the determination of the status of the claimants now

under consideration, it is only necessary to consider the resolutions and ordinances relating to town lots.

The resolution of March 20, 1905, provides a procedure for the rental of town lots. The provision of Article 1 of this resolution declaring null and void "all grants of lots or lands within the radius of the town that date from more than ninety days from the date of the concession and on which the concessioners have not begun to build," simply follows the provisions of Article IV of the decree of Governor Vila of 1886. This ordinance in Article 9 provides, by implication, for leases for a term of one year, and makes no mention of the rights or obligations of tenants in case the lease is terminated. The termination of leases is provided for in ordinance No. 2 of February 28, 1907, amending resolution No. 5. The pertinent portion of this ordinance reads as follows:

> ARTICLE 13. The lessee of any lot of land leased under the terms of this resolution shall deliver the same when called upon by the Mayor to do so, in the event the land is required for use by the municipality, the Government of the Canal Zone, or the Isthmian Canal Commission.
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> This amendment shall not be construed to abridge any rights which present lessees may have to notice respecting revocation of their leases or to any compensation for improvements placed on the land. It is, however, understood that upon expiration of the period of notice to which lessees may be entitled under the laws in force on the Canal Zone—such period dating from the approval of this ordinance—all lessees will hold their land subject to the terms of this amendment.

After careful consideration of the whole situation, the Commission has reached the conclusion that, while it was entirely within the power of the municipal council of Gorgona to provide for the leasing of town lots, it was beyond the power of the municipality to amend either the law of 1894 or the provisions of the Civil Code.

Whatever, therefore, may have been the conditions under which the town lots of Gorgona were leased, the ordinances of the municipality could not deprive tenants of rights secured to them by the act of 1894, and by Articles 739, 966 and 970 of the Civil Code.

That the action of the municipality could not have the effect of undermining or divesting rights guaranteed under the Civil Code is further confirmed, if such confirmation were necessary, by an examination of the general policy of the Government of the United States in the Canal Zone as laid down by the President of the United States in his instructions to the Secretary of War, under date of May 9, 1904, the pertinent portion of which reads as follows:

> The inhabitants of the Isthmian Canal Zone are entitled to security in their persons, property and religion, and in all their private rights and relations. They should be so informed by public announcement. The people should be disturbed as little as possible in their customs and avocations that are in harmony with principles of well-ordered and decent living.
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> The laws of the land, with which the inhabitants are familiar, and which were in

force on February 26, 1904, will continue in force in the Canal Zone, and in other places on the Isthmus over which the United States has jurisdiction, until altered or annulled by the said Commission, but there are certain great principles of government which have been made the basis of an existence as a nation which we deem essential to the rule of law and maintenance of order, and which shall have force in said zone. The principles referred to may be generally stated as follows:

That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation, that in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense, or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or ex post facto law shall be passed; that no law shall be passed abridging the freedom of speech or of the press, or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting the establishment of religion or prohibiting the free exercise thereof.

Leases or licenses issued by the Isthmian Canal Commission

It now remains to examine the effect of the acceptance of Isthmian Canal Commission leases or licenses on the status of those claimants who occupied town lots either under the renewable permits issued under the decree of March 16, 1886, or under leases from the municipality of Gorgona granted prior to the executive order of the President of the United States, dated March 13, 1907, which order abolished the municipalities of the Canal Zone.

Tenants of municipal lands belonging to this category acquired certain definite rights to compensation in case of eviction, under Law No. 50 of November 6, 1894, and under Articles 739, 966 and 970 of the Civil Code. These rights were not divested by the acceptance of the Isthmian Canal Commission licenses, and the claims of such persons, therefore, come within the jurisdiction of this Commission.

THE COMMISSION HAS, THEREFORE, REACHED THE CONCLUSION:

First. That nothing contained in the resolution No. 5 of the municipality of Gorgona, dated March 20, 1905, or in ordinance No. 2, dated February 28, 1907, can deprive those persons who occupy town lots either under the decree of March 16, 1886, or under a lease from the municipality of Gorgona, of the protection granted by Law No. 50 of 1894, or of Articles 739, 966 and 970 of the Civil Code, and it is immate-

rial in this connection whether such leases were acquired from the municipality of Gorgona prior to American occupation or subsequent thereto.

Second. Those persons, who, prior to March 13, 1907, possessed either renewable permits under the decree of March 16, 1886, or leases from the municipality of Gorgona are entitled to the protection of Article 5 of the law of 1894 and of the provisions of Articles 739, 966 and 970 of the Civil Code, specifically referred to in that law, and the subsequent acceptance of Isthmian Canal Commission leases or licenses does not divest them of the rights thus acquired.

Third. The plea of counsel for the United States in this case does not raise the question as to the status of claimants who, at the time of the acceptance of Isthmian Canal Commission leases or licenses, *did not* possess either a permit issued under the decree of 1886 or a lease issued by the municipality of Gorgona.

In view of the conclusions herein formulated, the Commission orders that the plea of counsel for the United States to the jurisdiction of the Commission be overruled.

In the appraisal of the lands in the Canal Zone taken over by the Government of the United States, an interesting question of interpretation presented itself to the Commission. Article 6 of the treaty of February 26, 1904, provides: "The appraisal of said private lands and private property and the assessment of damages to them shall be based upon their value before the date of this convention."

It was evident that the purpose of this clause was to prevent the burdening of the United States Government with speculative values on the lands which it might require for the construction of the Canal. The Commission undertook a careful investigation of land values prior to 1904 and found that owing to the unstable conditions that prevailed under Colombian rule, there was no market for real estate, and that there were comparatively few transfers recorded. Many of those recorded represented the foreclosures of mortgages rather than the direct results of bargain and sale. The fact, furthermore, that nearly ten years had elapsed since the ratification of the treaty greatly increased the difficulty of determining the value of lands prior to the ratification of the treaty. After prolonged discussion of the question, the Commission on the 25th of March, 1913, adopted the following rule:

In determining the value of lands taken by the United States, the

Commission must be governed by the terms of Article VI, which provides:

> The appraisal of said private lands and private property and the assessment of damages to them shall be based upon their value before the date of this convention.

In the application of the treaty, the Commission will follow the principles of the Commission of 1908, which are stated in their report to have been the following:

> To hear all evidence presented bearing upon the fair value of the property to be expropriated by the United States, and upon damages thereto: to consider especially, as elements of such valuation, the extent and character of the property affected, its location, for what it is adapted or could be adapted within a reasonable time; as well as to take into account other pertinent considerations, and, in determining the basis upon which damages are to be assessed, to eliminate from consideration the effect which the building of the Canal may have had upon the value of such estates.

The application of this rule proved entirely feasible, as well as satisfactory, and convinced the inhabitants of the Canal Zone that the United States had no desire to deal harshly with them in the adjustment of their rightful claims.

LEO S. ROWE.

INTERNATIONAL CONFERENCE ON SAFETY OF LIFE AT SEA

In these days of wars which have engulfed almost all Europe it is a satisfaction to recall that thirteen nations sent their delegates to an international conference relating to safety of life at sea, no longer ago than December, 1913, and that they signed on the 20th of January, 1914, a convention which has been adopted by many of the nations and which was transmitted to the Senate of the United States by the President on the 17th of March. All the resources of human skill and science are now being used to destroy life. It is a pleasure to reflect that man has at one time been engaged in a more humane and, shall we not add, a more Christian undertaking.

The thirteen Powers which joined in this conference are the following: Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, Netherlands, Norway, Russia, Spain, Sweden, United States of America. The delegates from Great Britain included delegates from Australia, Canada and New Zealand. Those great trans-oceanic commonwealths are renewing in both hemispheres the glory of the mother country. Their delegates also signed the convention, the conclusions of which were unanimous.

The convention applies to merchant vessels mechanically propelled which carry more than twelve passengers and which proceed from a port of one of the states, which are parties to the convention, to a port situated outside that state or conversely. Ports in the colonies are considered for the purposes of this article to be outside of the states of the high contracting parties. There may be excepted vessels making coastwise voyages not exceeding a distance of more than 200 sea miles from the nearest coast.

The first provision for the safety of navigation is for the destruction of all derelicts in the northern part of the Atlantic Ocean, for an ice patrol and the study and observation of ice conditions. The United States Government is invited to undertake these three services and the con-

tracting parties agree to join in paying the expense. Great Britain is to pay thirty per cent (beside a payment by Canada of two per cent) the United States, France and Germany fifteen per cent each, and the balance by the other Powers in smaller percentages. The United States is invited to devise a means of granting rewards to merchant vessels which have contributed in an effective manner to the destruction of ocean derelicts. Every master who meets with dangerous ice or a dangerous derelict is bound to communicate the fact as soon as possible, and if he have a radio-telegraph installation he is to report it immediately.

The loss of the *Titanic* led the convention to prescribe a new rule for navigation.

Article 10. When ice is reported on, or near, his course, the master of every vessel is bound to proceed at night at a moderate speed, or to alter his course so as to go well clear of the danger zone.

The conference after great deliberation decided not to fix any steamship routes but to leave this to the responsibility of the steamship companies. It is agreed further that there shall be imposed "on these companies the obligation to give public notice of the regular route which they propose their vessels should follow, and of any changes which they make in them."

The parties further agree "to use their influence to induce the owners of all vessels crossing the Atlantic to follow as far as possible the routes adopted by the principal companies." This system of ocean routes was recommended before the Civil War by Commander Maury of the United States Navy. It was taken up and advocated in 1870 by Thomas H. Ismay, one of the founders of the White Star Line. Experience has shown that the adoption by the principal steamship lines of the routes which he prescribed has been a source of safety. The old practice of setting the course westerly for Cape Race, Newfoundland, which led to so many shipwrecks on that rocky coast, has in the main been abandoned.

In view of the fact that many governments which were not parties to this convention had adopted the international regulations for preventing collisions at sea, and of the importance of uniformity in these regulations, the conference did not undertake to change these rules but

it recommended to the governments which were not parties to the convention an agreement to the following changes:

The second white light. Under the original international collision rules the use of any lights for steam vessels, except the one white masthead light, the starboard green light, and the port red light, was prohibited. In the inland waters of the United States however a different rule prevailed. As long ago as the year 1829 the State of New York prescribed for the guidance of vessels upon its inland waters the system of range lights, that is to say, of a fixed white light forward and another aft. Experience showed that a competent navigator by watching the bearing of these two lights and the change in their relative position could determine with much accuracy the course of an approaching vessel. An interesting question came before the Supreme Court of the United States in the year 1893. In this case a sea-going yacht which was equipped with lights and had them set in accordance with the regulations governing sea-going vessels, was proceeding up the Hudson River. The absence of range lights upon this vessel embarrassed an approaching steamer. The captain of this vessel had however, as the court held, sufficient means of observation to determine the true course of the approaching steamer, and the whole blame of the consequent collision was attributed to him.[1] But the result of the decision in this case and of the discussion at the International Conference at Washington in 1889 led the delegates of other nations to perceive the great advantage of the range light system and to recommend its adoption. It was not however made compulsory. The present convention recommends that it shall be compulsory. They also recommend a stern light which was prohibited by the original rules, though they permitted a leading vessel to show a torch or other light to indicate her position to a following ship.

It is then recommended that there shall be a special day signal compulsory for motor vessels and a special sound signal to be used "by a vessel in tow, or if the tow is composed of several vessels, by the last vessel of the tow." The convention further provides that the vessels coming within its scope "shall be sufficiently and efficiently manned." Measures to secure this result are to be taken by the parties.

The fourth chapter of the convention deals with the construction of

[1] Belden *v.* Chase, 150 U. S. 674.

vessels and with the important subject of openings in watertight bulkheads. These are to be reduced to a minimum. Double bottoms are to be provided in most vessels: "The highest degree of safety corresponds with the vessels of greatest length primarily engaged in the transportation of passengers." It is interesting to note that in the schedules and regulations annexed to the convention vessels 1030 feet in length are provided for. Such was the care of the convention with reference to perfecting the construction of ships that all the parties agreed to cause the study of "the criterion of service" to be prosecuted by each. The results are to be communicated to the British Government, which is to undertake the task of circulating the information.

Chapter V requires all merchant vessels belonging to any of the contracting states, whether they are propelled by machinery or sails, and whether they carry passengers or not, "to be fitted with a radiotelegraph installation if they have on board fifty or more persons in all." Vessels on short voyages or on which there is a temporary increase in number of persons on board may be excepted.

Article 35 provides: "The radiotelegraph installations required by Article 31 above shall be capable of transmitting clearly perceptible signals from ship to ship over a range of at least 100 sea miles by day under normal conditions and circumstances." Vessels having these installations are required to be fitted with an emergency installation which must be placed in its entirety in the upper part of the vessels as high as practically possible, and this must include "an independent source of energy capable of being put into operation rapidly and of working for at least six hours with a minimum range of 80 sea miles for vessels in the first class and 50 sea miles for vessels in the two other classes."

Article 37 requires every master of a vessel who receives a call for assistance from a vessel in distress to proceed to the assistance of the persons in distress. The master of the vessel in distress may requisition from among those that answer his call for assistance the vessels which he considers best able to render assistance. This he must do after consultation as far as may be possible with the masters of those vessels.

Chapter VI contains ample provision for life-saving appliances and fire protection. The fundamental principle is stated in Article 40 as

follows: "At no moment of its voyage may a vessel have on board a total number of persons greater than that for whom accommodation is provided in the lifeboats and the pontoon life rafts on board."

Article 42 is important. "Each boat must be of sufficient strength to enable it to be safely lowered into the water when loaded with its full complement of persons and equipment."

Article 53 contains a provision for the installation of electric or other system of lighting sufficient for all requirements of safety. "On new vessels there must be a self-contained source capable of supplying, when necessary, this safety lighting system, and placed in the upper parts of the vessel, as high as practically possible." This latter clause is especially important in view of the practice which has become common of lighting vessels from dynamos propelled by the main source of power. Before this method was adopted, every vessel had a source of lighting independent of the main power. In many steamers in which the side lights and the masthead lights are electric, provision is now made for the immediate installation of oil lights in case the electrical apparatus is out of order. The convention extends this principle to the lighting of the whole ship. It is so common in cases of collision to find that the main source of power on the vessel is put out of commission that this new requirement is one of the most important in the whole convention.

Another new provision is contained in Article 54. "There must be, for each boat or raft required, a minimum number of certificated lifeboat men." Provision is made for the examination of these men. This rule is a substitute for that recommended by the International Seamen's Union of America. This Union is seeking to establish a requirement for a certain number of able-bodied seamen. It would seem perfectly clear that for the purpose of handling the lifeboats or life-rafts skill in boating is the essential. A man might be a good seaman and yet not be skillful in handling boats. On the other hand a man might be very skillful in the latter who was not an experienced seaman. There seems no good reason for confusing two objects which in their nature are distinct.

Article 55 contains the following important provision.

The carriage, either as cargo or ballast, of goods which by reason of their nature, quantity, or mode of stowage, are, either singly or collec-

tively, likely to endanger the lives of the passengers or the safety of the vessel, is forbidden.

Chapter VII provides for safety certificates to be issued by each government which is a party to the convention for its own vessels, to be guaranteed by it, and to be recognized as valid by the other nations which are parties to the convention. On this subject there was much debate in the conference. Germany and France have always insisted upon the doctrine that a vessel is part of the territory of the nation to which it belongs and that it is not subject even in the port of another nation to the jurisdiction of the latter. The compromise finally agreed to by all parties is stated in Article 61.

Every vessel holding a safety certificate issued by the officers of the contracting state to which it belongs, or by persons duly authorized by that state, is subject in the ports of the other contracting states to control by officers duly authorized by their governments in so far as this control is directed towards verifying that there is on board a valid safety certificate, and, if necessary, that the conditions of the vessel's seaworthiness correspond substantially with the particulars of that certificate; that is to say, so that the vessel can proceed to sea without danger to the passengers and the crew.

This latter article also is criticized severely by the International Seamen's Union of America, but, as we think, with little reason. It is impossible to suppose that all other nations should yield their own judgment in regard to vessels to the autocracy of the United States of America. The very object of this convention is to obtain substantial uniformity. It is in the public interest that this uniformity should exist. The convention has gone in this respect as far as the different nations would agree, and we think it unfortunate that there should be opposition to the adoption of so beneficial a convention which is on the whole a great advance, because of its failure to subject all vessels coming to the ports of the United States to the requirements of the peculiar laws of the latter country.

It is interesting to notice in the regulations appended to the convention the adoption of Greenwich mean time as the time to be used in radio-telegrams; and the adoption of the decimal system of measurement for the expression of the barometer in radio-telegrams. A table is appended giving the equivalent in inches.

In the safety signals provided for, the Morse code of dots and dashes is recognized and adopted. The great patent lawyer, Edward N. Dickerson, always maintained that this Morse code was all that S. F. B. Morse invented and that the rest of his telegraphic apparatus was the adoption of methods which were well known. In this he was hardly just. It is true that he used an electro magnet which Professor Henry had invented, and that the various parts of his apparatus had been used before. The merit of Morse was in putting them together in what was in its time an effective telegraphic instrument, and which was, for practical purposes, the first effective telegraphic instrument. But whether or not we agree with Mr. Dickerson in this respect, it cannot be denied that the Morse alphabet was an invention of great utility. Nothing shows this more clearly than its universal adoption.

In the schedules annexed to the convention detailed requirements are specified for the construction of fire-proof and water-proof bulkheads, for openings in the bulkheads and openings in the vessels sides. All doors in bulkheads are to be opened from the bridge, but must also be operated by hand at the door itself. The side scuttles and cargo ports must "be closed watertight and locked before the vessel leaves port. They shall not be opened during navigation." Vigilance and accuracy are insured by the requirements of a hose or flooding test for watertight decks and a hose test to watertight trunks. There is to be a drill for the operating of watertight doors, side scuttles, scuppers, ash shoots, etc., before leaving port, and at least once a week during the voyage. "All watertight power doors and hinged doors in main transverse bulkheads in use at sea shall be operated daily."

Article XXII of these regulations provides that "vessels shall have sufficient power for going astern to secure proper control of the vessel in all circumstances." This seems an appropriate place to note one defect in the existing collision rules to which attention is not called in this convention. When these rules were originally made twin screws were unknown, and the framers of the revised rules seem to have overlooked the fact that the course of a twin screw vessel may be changed more quickly by putting one engine full speed ahead and the other full speed astern than in any other way. Every person who is accustomed to row without a rudder is familiar with the analogous method of turning a

rowboat. Any person who has sailed through the St. Marys River between Lakes Superior and Huron and watched its narrow and crooked channels, must have noticed how quickly the course of a twin screw steamer can be altered by this simple method. If the captain of the *Empress of Ireland* had adopted this method when the collision was imminent he would have received the blow from the *Storstad* near his bow and while both vessels would have been injured, in all probability neither would have sunk. The bow, in short, is the strongest and least vulnerable part of a steamer. The midship section is the weakest.

In like manner it would have been well if the framers of this convention had drawn attention to the latter fact and had recommended an amendment to the collision rules to the effect that the captain of a steamer carrying passengers should especially avoid exposing his broadside to an approaching vessel. The fatal collision between the *Ville de Havre* and the *Loch Earn* on November 22, 1873, was caused by a neglect of this precaution. The captain of the French vessel underrated the speed of the approaching ship and thought he could cross her bows with safety. She kept her course, as she had a strict right to do, and the result was that the steamer was struck amidship and quickly sank with the loss of almost all on board, including Judge Rufus W. Peckham of the New York Court of Appeals, the father of the late Mr. Justice Peckham of the United States Supreme Court. On the other hand, in the collision in 1875 between the *Harvest Queen* and the *Adriatic*, Captain Jennings of the *Adriatic* pursued the course which we have just recommended. When he perceived from the lights of the approaching ship that there was danger of collision, he manœuvered so as to present his bow constantly to her and in this way met all her changes of course by a corresponding change on his side. The result was that his vessel received a very trifling injury. The ship sank, but it was held in all the federal courts, including the Supreme Court of the United States, that Captain Jennings was right.[2] If the captain of the *Empress of Ireland* had observed this precaution he would have saved his precious freight of passengers. No doubt the general requirements of the existing rules are sufficient to cover both precautions. But it would be worth while to have these two special precautions specified. Captains often neglect

[2] 107 U. S. 512.

the first altogether, and are not as careful as they ought, to observe the second.

Ample provisions are made in Article XL for the equipment of boats and pontoon rafts. It is interesting to notice that each is required to have a vessel containing a gallon of vegetable or animal oil "so constructed that the oil can be easily distributed on the water and so arranged that it can be attached to the sea anchor." It should be noted that Captain Karlowa of the Hamburg American steamer *Palatia*, was one of the first practical seamen to call attention to the great advantage of this method of preventing waves from breaking over a floating object. His little book on the subject is an authority.

Each boat or raft must also be furnished with a watertight receptacle containing two pounds weight of food for each person and a watertight receptacle containing one quart of water for each person. There shall also be provided a number of self-igniting "red lights" and a watertight box of matches. The boats are to accommodate seventy-five per cent of the persons on board and the remainder of the accommodation may be in boats or pontoon rafts. The character of life buoys to be furnished is carefully specified. Each "shall be capable of supporting in fresh water for twenty-four hours" fifteen pounds of iron. This shows the safe margin of buoyancy required to float a man, who in another article is estimated at the average weight of 165 pounds. Luminous life buoys are to be provided "in no case less than six." The lights shall be efficient self-igniting lights which cannot be extinguished in water. "The life buoys shall always be capable of being rapidly cast loose, and shall not be permanently secured in any way."

One other point in reference to this convention deserves notice. There is no requirement that the seamen shall all be Caucasians. The matter of the race of the seamen manning vessels is left to the judgment of each nation. This feature of the convention is also criticized by the Seamen's Union. Their aim is to exclude Orientals. The Lascars of British India, and the Chinese and Japanese make good sailors. Why vessels trading to those countries should not be permitted to employ them is hard to say. The convention does require that all persons in the service of the ships shall be able to understand the orders. This in our opinion goes far enough.

No man is obliged to become a sailor. We are not convinced by the arguments of those who criticize the convention in this respect that the native American of to-day will love the sea as his ancestors did. The experience of school ships and naval colleges where every opportunity is afforded for training in practical seamanship shows the contrary. Our public school system tends to train the young American for vocations on land and consequently to discourage the vocation of a seaman. The opposition on this ground to the ratification of the convention shows a narrow spirit of race prejudice, like the selfish spirit shown by the strike of railroad engineers which took place at one time in Georgia in order to prevent the employment of negroes as firemen, but which failed, owing largely to the eloquence and influence of a gallant old Confederate officer, Major J. B. Cummings of Augusta. This spirit of racial prejudice which seems to make men forget that other individuals have rights and which would exclude the native of British India or China or Japan from earning an honest living on the sea is directly opposed to the spirit of Christianity. St. Paul says, "God has made of one blood all nations of men to dwell upon the face of the earth." In the Roman theatre the famous sentence of Terence was applauded: *Homo sum; nullum humanum a me alienum puto.* In our own Declaration of Independence it is declared that all men are "endowed by their Creator with certain inalienable rights. Among these are life, liberty and the pursuit of happiness." There would seem no good reason for an international agreement which would deprive the honest hardworking people of India, China or Japan of the liberty of following the sea or pursuing happiness by earning a living there.

In this connection, special attention should be paid to another argument contained in the protest against the ratification of the convention. The argument referred to favors the abolition of punishment for desertion and calls the obligation of a seaman to serve out his agreed term of service slavery. How it should be slavery to oblige a man who has voluntarily entered into a contract to keep that contract is hard to understand. No one is obliged to be a sailor, but if he choose to follow that calling he certainly ought to do as other men are required to do and keep his contract. So far from perceiving the justice of this, the proponents of the proposition advocate a contrary rule on the ground that a man

who has enlisted in a foreign port for a particular term and comes to a port of this country ought to have the right to break his contract and desert in order to get higher wages here. Those who see nothing wrong in this suggestion, may be excused on the ground that class prejudice has beclouded the distinction between right and wrong in matters which concern their class interests. Discipline and loyalty are as important in the merchant marine as in the naval service. A man who promotes desertion in one is as dangerous as he who would promote it in the other. We cannot believe that in the end the Congress of free and united America will be influenced by these selfish arguments. We expect therefore that this convention, which represents the careful study of the best minds of the thirteen nations engaged in the conference, will be ratified by the American Senate.[3]

EVERETT P. WHEELER.

[3] For a sketch of the history of the international regulation of ocean travel prior to the London Conference, the reader is referred to the author's address on the subject, delivered at the Sixth Annual Meeting of the American Society of International Law, April 25, 1912, Proceedings for that year, page 36.

THE ORIGIN OF THE HAGUE ARBITRAL COURTS

The purpose of this study is the narration in detail of the responsible suggestions and action that resulted in erecting the Permanent Court of Arbitration at The Hague and in bringing into the realm of "practical" statesmanship the Court of Arbitral Justice, designed as a genuine tribunal instead merely of a panel of judges. The origin of these courts, which, even as they exist, are the greatest achievements in the institutionalizing of international law, is important because in some degree it demonstrates the processes by which international law grows and it registers to some extent the state of its legislative development. Everybody knows that you cannot bring a code of international law into effect by the process of introducing a bill in any legislature, but beyond that there is no agreement or even any very clear conception as to the processes of securing international institutions. A study of the origins of the two Hague courts of general jurisdiction furnishes some clue to the existing processes, and is the more interesting because most "practical" people denied their possibility so long as the constituent conventions were not actually in existence. The origins of these two courts, in so far as they reveal a principle, point to the conclusion that the idealism of the world can be wrought into effective machinery when the trained publicist takes hold of it and works it into forms harmonizing with existent conditions.

In international affairs it is perhaps more true than elsewhere, that "you never can tell till you try." The reason is obvious, and may be pointed out because of its bearing on the approaching success of plans for a real international judicial court. International public opinion is the most elusive of any kind of public opinion; in fact, the international public opinion which must in the future uphold international institutions does not now really exist at all. Literally, we do not see the woods for the trees, and publicists dealing with matters of the international order actually must grope their way through the trunks of national partic-

ularism to their goal of international institutions. Illustrations might be given *ad libitum*, but it is sufficient to mention that the Permanent Court was perhaps the least-expected result of the First Hague Conference and that the barely unsuccessful career of the Court of Arbitral Justice through the Second Hague Conference was a genuine surprise to most observers, while the blocking of its full realization came from quarters previously unsuspected. Because the origin of these courts indicated the truth that the world was ready for much better instruments for conducting its work than it hitherto possessed is a reason for its examination being worth while.

I. THE PERMANENT COURT OF ARBITRATION

Assignment of credit for the existence of the Permanent Court of Arbitration at The Hague usually depends upon the national complexion of the person who seeks to place the honor. Americans say it was due to an American proposal; Britons, to a British proposal; and continental Europeans can usually find arguments to show that it had an origin among their publicists. To be sure, controversy has not been acute on the subject, but its existence at low tension suggests that a careful history of the origin of the court might throw light upon what may well be considered the normal development of international judicial machinery.

The Permanent Court came into existence not because of the proposal of any single state participating in the First Hague Conference, but because the world was ready for the idea. For all practical purposes, it may be said to have originated simultaneously in three quarters, and it is scarcely too much to say that Russia, Great Britain and the United States each saw its own proposal transcended in the resultant convention. None of them had in their suggestions been entirely successful in estimating the extent of the development for which the world was ready.

The idea of an international tribunal was, of course, not new, for it had been broached with increasing frequency during six hundred years, from the days of Pierre du Bois. But it was not until 1899 that there was convened a general conference capable of discussing the question with responsible authority. Besides the knowledge on the subject in the minds of the delegates, a volume of texts relating to the Conference program and prepared by Jonkheer van Daehne van Varick under the

title of *Actes et Documents relatifs au Programme de la Conférence de la Paix*, was issued by the Dutch government. Another volume, W. E. Darby's *International Tribunals*, was placed in the hands of the delegates and the fifty or more projects in it made available to the responsible negotiators the ideas that had been fructifying. Curiously enough, the applicable chapters of James Lorimer from his *Institutes of the Law of Nations*—in many respects superior to other projects—were not referred to in either volume. But the omission was one of diligence rather than of importance, for after the Hague Conference was once seized of the proposal for an international court its experienced delegates were quite capable of going through to a conclusion without academic assistance. It does not appear that any projects played any important part in their decisions, except as is indicated below.

Credit for first realizing the possibility of developing international legal machinery through the First Hague Conference must be given to the United States, though it must not be overlooked that Frederick de Martens, who was responsible for the Russian program, had provided the following as a subject of its labors:

> 8. Acceptance, in principle, of the use of good offices, mediation and voluntary arbitration, in cases where they are available, with the purpose of preventing armed conflicts between nations; understanding in relation to their mode of application and establishment of a uniform practice in employing them.

This article in the program of December 30, 1898, may be considered as deducible from the closing sentences of the Czar's manifesto of August 24, 1898, in which it is said:

> It [the conference] would converge in one powerful focus the efforts of all the states which are sincerely seeking to make the great conception of universal peace triumph over the elements of trouble and discord. It would at the same time cement an agreement by a corporate consecration of the principles of equity and right, on which rest the security of states and the welfare of the peoples.

The writer does not know the origin of this article of the program, but it is not unlikely that M. de Martens' experiences as an arbitrator had to do with it.

Dr. David Jayne Hill, then an assistant secretary of state, was re-

sponsible for the instructions of April 18, 1899, issued to the American delegates by Secretary Hay and in them occurs this passage:

> The eighth article, which proposes the wider extension of good offices, mediation and arbitration, seems likely to open the most fruitful field for discussion and future action. "The prevention of armed conflicts by pacific means," to use the words of Count Muravev's circular of December 30, is a purpose well worthy of a great international convention, and its realization in an age of general enlightenment should not be impossible. The duty of sovereign states to promote international justice by all wise and effective means is only secondary to the fundamental necessity of preserving their own existence. Next in importance to their independence is the great fact of their interdependence. Nothing can secure for human government and for the authority of law which it represents so deep a respect and so firm a loyalty as the spectacle of sovereign and independent states, whose duty it is to prescribe the rules of justice and impose penalties upon the lawless, bowing with reverence before the august supremacy of those principles of right which give to law its eternal foundation.
>
> The proposed Conference promises to offer an opportunity thus far unequaled in the history of the world for initiating a series of negotiations that may lead to important practical results. The long-continued and widespread interest among the people of the United States in the establishment of an international court, as evidenced in the historical résumé attached to these instructions as Annex A, gives assurance that the proposal of a definite plan of procedure by this Government for the accomplishment of this end would express the desires and aspirations of this nation. The delegates are, therefore, enjoined to propose, at an opportune moment, the plan for an international tribunal, hereunto attached as Annex B, and to use their influence in the Conference in the most effective manner possible to procure the adoption of its substance or of resolutions directed to the same purpose. It is believed that the disposition and aims of the United States in relation to the other sovereign Powers could not be expressed more truly or opportunely than by an effort of the delegates of this Government to concentrate the attention of the world upon a definite plan for the promotion of international justice.

Annex A referred to is an historical résumé of the part the United States had played in developing arbitration, ranging from the resolution of the Massachusetts Senate in 1832 up to the then recent publication of Moore's *Digest of International Arbitrations*. Reverting from governmental action to projects, the historical résumé mentions those of Bluntschli, Lorimer, David Dudley Field, Leone Levi, the Institute of International Law in 1874 and 1875, the Universal Peace Congress in

1893, the Interparliamentary Conference of 1895 and the Bar Association of the State of New York in 1896. Too great elaboration and complication and the lack of opportunity to propose them to an authoritative international body are assigned as the twin reasons for their failure.

Annex B [1] consisted of a plan for an international tribunal embodying "the most useful suggestions of all the plans proposed," but though it was prepared in April, it was not destined to be the earliest proposal introduced into conference, except by reputation. It affected the course of events in the Third Commission of the Conference, which had to do with arbitration; and the advocacy of the eventual scheme by the delegates of the United States, together with their ardent championship of the Permanent Court, goes far toward entitling them to credit for its establishment.

The course of the court project through the Third Commission of the Conference makes its origins clear.

In his instructions of May 16, 1899, to Sir Julian Pauncefote, first British delegate, the Marquis of Salisbury wrote:[2]

> With regard to the question of making the employment of mediation or arbitration more general and effective for the settlement of international disputes, it is unnecessary for me to say that it is a matter to which Her Majesty's Government attach the highest importance, and which they are desirous of furthering by every means in their power. During the negotiations which your excellency has conducted at Washington for the conclusion of a treaty of general arbitration between this country and the United States, you were placed in full possession of the views of Her Majesty's Government on the subject. Those views have further received practical application in the conclusion of a treaty, also negotiated by your excellency, for the submission to arbitration of the disputed question of the frontier between British Guiana and Venezuela. [See *Foreign Relations*, 1896, 222 and 255.] The success with which you conducted both these negotiations induces Her Majesty's

[1] See these annexes in *For. Rel.*, 1899; Sen. Doc. No. 444, 60th Cong., 1st Sess., 18–23; and World Peace Foundation, Pamphlet Series, III, 4, 6–12. It will be well for the student to look up for comparison with this *International Justice; with a plan for its permanent organization* by David Jayne Hill. This was a paper read before the American Social Science Association at Saratoga on September 3, 1896, and the Brooklyn Institute of Arts and Sciences on October 26, 1896. It was published in pamphlet form from a text to be found in the *Yale Law Journal*, 6:1, and *Journal of Social Science*, 34:98.

[2] *Miscellaneous, No. 1 (1899)*, 9–10, in Parl. Pap. 1899, CX.

Government to feel sanguine that on the present occasion your efforts may be equally productive of good result.

On May 17, doubtless before these instructions were received, Andrew D. White, the first American delegate, wrote that "it turns out that ours is the only delegation which has anything like a full and carefully adjusted plan for a court of arbitration. The English delegation, though evidently exceedingly desirous that a system of arbitration be adopted, has come without anything definitely drawn. The Russians have a scheme; but, so far as can be learned, there is no provision in it for a permanent court." [3]

On May 23 the American delegation met to discuss the matter of asking additional instructions on arbitration, due to a fear that the Monroe Doctrine had not been sufficiently considered in connection with its plan. The telegram was drafted and sent the next day, but the tenor of the reply is not of public record. On the 24th, Sir Julian Pauncefote and others called on the Americans to talk over the general subject. The first session of the commission had met, but it was purely formal, and the first business meeting was scheduled for two days ahead.

Russia, it seems, had at first given out that she had no definite plans for a tribunal, but soon after the Conference convened on May 18 the statements of the Russian delegates were discrepant on this point, and by May 25 Russia proposed a system of arbitration, mediation and inquiry, which Baron de Staal, head of the delegation, said would be laid before the body in a few days. This evident change in the Russian plans was probably due to the volume of texts relating to the Conference program which had been prepared by Jonkheer van Daehne van Varick, published by the Dutch Government and placed in the hands of the delegates. It contains, under the head of adjustment of international disputes, 18 projects relating to good offices, mediation and voluntary arbitration, many of which are cited in Mr. Hay's historical memorandum mentioned above.

On May 26 the second session of the Third Commission under the presidency of Léon Bourgeois was held. The proceedings began with the reading of a letter from Baron de Staal enclosing two documents.

[3] *Autobiography of Andrew D. White*, II, 255. Succeeding references to American action are based on the same source.

One was entitled "Elements for the elaboration of a project of convention to be concluded between the Powers participating in the Hague Conference" and consisted of 18 articles divided into the three heads of good offices and mediation, international arbitration and international commissions of inquiry. Articles 7–13, dealing with arbitration, enumerated questions for which arbitration was obligatory and those for which it was voluntary only; an annex provided a code of arbitral procedure. There was no suggestion of a permanent or even definite court.

M. Bourgeois, the president, in opening the discussion, after distinguishing between optional, obligatory and compromissary arbitration, asked:

> Is there need of establishing in a permanent manner an international institution to which would be given a mandate:
> 1. Either as a purely intermediary organ, serving to recall to the parties the existence of conventions, the possible application of arbitration and offering to set procedure in motion;
> 2. Or as an institution of conciliation before any juridic discussion;
> 3. Or, finally, as jurisdiction under the form of an international tribunal?

Writing on May 28 to Lord Salisbury of the further proceedings, Sir Julian Pauncefote said:

> Your lordship will observe that the project contains no provision for the establishment of a permanent international tribunal of arbitration, though I have gathered from my colleagues that, nevertheless, several Powers, including Russia herself, were quite willing to entertain a proposal for the establishment of such a tribunal, but that none of them were inclined to be the first to introduce the subject. The president, immediately after laying the Russian project before the convention, invited observations from any delegates who might desire to put forward any projects of their own, and he appealed to me for any remarks I might have to make on the subject of arbitration.

Sir Julian spoke "in the sort of plain, dogged way of a man who does not purpose to lose what he came for," Mr. White reports. He said:[4]

> Permit me, Mr. President, to ask you if, before proceeding further, it would not be useful and opportune to sound the Commission on the

[4] The extensive quotations given from the *procès verbaux* have been practically literally translated in an effort to reflect better their points of contrast. Practically all are given in Scott's *The Two Hague Conferences of 1899 and 1907*, I, 274–286.

subject of what is in my opinion the most important question, that is, the establishment of a permanent international tribunal of arbitration, on which you have touched in your discourse.

Much has been made of codes of arbitration and rules of procedure, but procedure has been regulated up to now by arbitrators or by general or special treaties.

It seems to me that new codes and regulations for arbitration, whatever their merit, do not much advance the great cause which brings us together.

If we desire to take a step in advance, I am of the opinion that it is absolutely necessary to organize a permanent international tribunal which may be convened on a moment's notice at the request of the contesting nations. This principle established, I believe that we shall not have much difficulty in reaching an understanding on the details. The necessity for such a tribunal and the advantage it would offer, as well as the encouragement and even enthusiasm it would give to the cause of arbitration, have been shown with an eloquence, equalled only by his force and clarity, by our distinguished colleague M. Descamps in his interesting *Essai sur l'arbitrage international*,[5] an extract from which is found among the *Actes et Documents* so graciously furnished to the Conference by the Dutch Government. Therefore nothing remains for me to say on this subject and I should be very grateful, Mr. President, if before proceeding further, you would consent to collect the ideas and opinions of the Commission on the proposition which I have had the honor of submitting to you touching the establishment of a permanent international court of arbitration.

Count Nigra of Italy asked Sir Julian not to insist on his proposal being assigned a place on the general order of the Commission's work. "It is preferable to follow the order indicated by the president and to take up last the English motion, which seems destined to encounter difficulties." M. Beernaert of Belgium supported the experienced Italian diplomat and added that the proposition found the Commission unprepared and that it would be advantageous for its members to have time to examine it and, if necessary, refer to their governments concerning it. Baron de Staal agreed, and M. Beernaert then inquired if Sir Julian had a written text. The English delegate replied that he desired only to obtain the opinions of the Commission on the principle, but if this was adopted he reserved the right of formulating the proposition later. He did not insist on immediate discussion.

[5] Subtitle *Mémoire aux Puissances*. Brussels: Misch & Thron. 1895. 5 fr. Publication of Union Interparlementaire.

The president, M. Bourgeois, now interposed to say that the Commission had before it the Russian project and the English motion and that, as it seemed difficult to begin discussion in Commission, he proposed preliminary study by an examining committee. Baron Descamps of Belgium suggested its appointment by the chair, which was the procedure followed. A general resolution was then passed, a recess was taken to give time for choosing the committee and on reassembling a few minutes later Messrs. Asser of Holland, Descamps of Belgium, d'Estournelles of France, Holls of the United States, Lammasch of Austria-Hungary, De Martens of Russia, Odier of Switzerland and Zorn of Germany were named to the Committee of Examination, with M. Bourgeois, president, and Count Nigra and Sir Julian Pauncefote, honorary presidents. Parliamentary matters took up a minute or so. It is evident, to quote from the report of the French delegation, that Sir Julian Pauncefote's speech had "put the question of the permanent tribunal of arbitration in such a way that discussion of it could not be evaded, and it decided the Russian Government to put it also." Just before adjourning M. Bourgeois read a communication from Baron de Staal, "which completes the Russian proposition." This document, which was to be printed and distributed at the same time as Sir Julian Pauncefote's motion and which was the first technical proposal for an international court presented to any official conference, reads as follows:

ART. I.[6] With a view to strengthening, so far as possible, the practice of international arbitration, the contracting Powers agree to institute, for the period of —— years, a court of arbitration, to which may be submitted the cases of obligatory arbitration enumerated in Art. 10,[7] unless

[6] This draft was intended to substitute for, or supplement, Art. 13 of the original Russian proposition, the text of which is as follows:

ART. 13. With a view to facilitate recourse to arbitration and its application, the signatory Powers have consented to determine by common agreement, for cases of international arbitration, the fundamental principles to be observed for the establishment and rules of procedure to be followed during the trial of the dispute, and the pronouncement of the arbitral sentence.

The application of these fundamental principles, as well as of arbitral procedure indicated in the appendix to the present article (Arbitral Code), may be modified in virtue of a special agreement between the states which may have recourse to arbitration.

[7] ART. 10. Beginning from the ratification of the present act by all the signatory

the interested Powers should fall into accord on the establishment of a special court of arbitration for the solution of the conflict arising between them.

The Powers in dispute shall also be able to have recourse to the court above indicated in all cases of optional arbitration, if a special agreement on this subject is established between them.

It is understood that all the Powers, without excepting those not contracting or those which should have made reservations, may submit their differences to this court by addressing the Permanent Bureau provided by Art. [5, *below*] of Appendix A.

ART. II. The organization of the court of arbitration is indicated in Appendix A to the present article.

The organization of courts of arbitration instituted by special agreements between the Powers in dispute, as well as the rules of procedure to be followed during the settlement of the dispute and the pronouncement of the arbitral sentence, are determined in Appendix B (Arbitral Code).

The provisions contained in this last appendix may be modified in virtue of a special agreement between the states which shall have recourse to arbitration.

The writer stands open to correction, but he believes that this was all of the Russian proposition presented at the Commission session of May 26. It was about as much as could have been drafted in the available interval between the suggestion of Sir Julian Pauncefote and the presentation of the project, and it is essentially all that

Powers, arbitration is obligatory in the following cases, in so far as they do not touch the vital interests or the national honor of the contracting States:

I. In case of differences or of disputes with relation to pecuniary damages proved by one state, or its nationals, as a result of illicit actions or of negligence of the other state, or of the citizens of the latter.

II. In case of disagreements with relation to the interpretation or application of the treaties and conventions mentioned below:

1. Treaties and conventions dealing with postal and telegraphic affairs, railroads, and treating of the protection of submarine cables; regulations concerning the means destined to prevent collisions of ships on the high seas; conventions relative to the navigation of international rivers and interoceanic canals.

2. Convention concerning the protection of literary and artistic property, as well as of industrial property (patents of invention, trade or commercial marks and commercial names); monetary and metric conventions; sanitary and veterinary conventions and those against phylloxera.

3. Conventions of succession, of cartel and of mutual judicial assistance.

4. Conventions of demarkation, in so far as they touch purely technical and non-political questions.

the British delegate transmitted [8] to his government as long after as May 31.

"I did not expect that a reply to my inquiry could be given at this session and without careful consideration," wrote the first British delegate. "The president at this juncture laid before the Commission an alternative Russian project providing for the establishment of a permanent tribunal, but omitting any details with a view to these being inserted." M. de Martens, who wrote the material Baron de Staal presented, had evidently drafted it after Sir Julian Pauncefote had begun to talk. Though the sequence of events may seem to indicate unseemly haste on the part of Russia, it must be remembered that M. de Martens was a publicist and jurisconsult of many years' experience, was at that very time engaged in the Venezuelan boundary arbitration at Paris as umpire and was familiar not only with all the proposals of serious worth for an international court but had before him Baron Descamps' essay and Jonkheer van Varick's collection of documents. With such an equipment, it is not surprising that he sought to complete the Russian project, in a respect he had carefully excluded at the beginning, solely because he had suddenly become aware that the measure was practical.

After the session of the Commission Sir Julian Pauncefote lost no time in setting down his own ideas. In his dispatch of May 26 he details it and comments on "the scheme of an international tribunal which I have suggested to several of the most eminent and influential delegates, and which appears to meet with their approval." His summary at that time was as follows: Organization of a permanent international tribunal accessible at all times; a permanent office; judges selected from jurists or publicists of high character and learning, two names of which shall be submitted by each signatory Power; arrangements for arbitration to be made through the permanent office; non-signatories to have re-

[8] *Miscellaneous No. 1 (1899)*, Parl. Pap. 1899, CX, 25, where this annex to the project is given: "In case of acceptance of Arts. 1 and 2 there would be need:

"1. Of preparing Appendix A mentioned in the article;

"2. Of introducing corresponding modifications into the project of Arbitral Code."

The addition is printed in the annexes to report to the plenary sessions and in Scott, *op. cit.*, I, 794. Russia's Appendix A is there translated at page 795 and the Arbitral Code at page 789.

course to the court on prescribed regulations; a council of administration; sharing of expenses.

On the day the Committee of Examination was appointed it met for the initial session, probably in the afternoon. According to the *procès verbal*, the documents then presented included Sir Julian Pauncefote's project and the Appendix A referred to in the Russian project. Another, and new, project was several amendments offered by Count Nigra of Italy to the Russian project, which were ordered to be printed as the others had been, but as it did not relate to the court it need not concern us further. It thus happened that the details contemplated by Russia and Great Britain were presented at the same time and were to be considered together, for Sir Julian Pauncefote in writing of the meeting said in his report:

> It appears to me that the Russian project might be substantially accepted by Her Majesty's Government, provided that it be completed by the insertion in Annex A of a simple scheme for the establishment of an international tribunal in a few articles which would harmonize with the rest of the project.
>
> In accordance with the request of M. de Martens, who is the author of the Russian project, I have framed the above scheme in seven articles for insertion, if approved, in Annex A, and I should be grateful if I could be informed as early as possible whether it meets in substance with your Lordship's [Salisbury's] approval.

The Russian Appendix A [9] reads as follows:

> 1. The contracting Powers establish a permanent Tribunal for the solution of the international disputes which shall be brought before it by the Powers in dispute in virtue of Article 13 of the present convention.
>
> 2. The Conference shall designate, for the period which shall elapse until the meeting of a new Conference, five Powers so that each of them, in case of request for arbitration, may appoint a judge, either of the number of its nationals or outside of them.
>
> The judges so appointed constitute the arbitral Tribunal competent for the case agreed upon.
>
> 3. If one or several Powers not represented in the arbitral Tribunal in virtue of the preceding article is among the Powers in dispute, each of the two parties in dispute shall have the right of being represented by a person of its choice in the quality of judge, having the same rights as the other members of the said Tribunal.

[9] *Cf.* Scott's translation, *op. cit.*, I, 795.

4. From its members the Tribunal chooses its president who, in case of division of votes in equal parts, shall have the preponderant vote.

5. A permanent Bureau of arbitration shall be established by the five Powers which shall be designated in virtue of the present act to constitute the arbitral Tribunal. They shall elaborate the regulations of this Bureau, appoint the employés thereof, provide for their replacement when the case arises and fix their salaries. This Bureau, which shall be at The Hague, shall comprise a secretary general, an assistant secretary, a secretary of archives, as well as the rest of the personnel, which shall be appointed by the secretary general.

6. The expenses of maintenance of this Bureau shall be divided among the states in the proportion established for the international postal Bureau.

7. The Bureau annually renders account of its activity to the five Powers which appoint it and they communicate the report to the other Powers.

8. The Powers between which a dispute may have arisen shall address the Bureau and provide it with the necessary documents. The Bureau shall advise the five Powers above-mentioned, which are to constitute the Tribunal without delay. This Tribunal shall ordinarily meet at The Hague; it may likewise meet in any other city, if an agreement to this effect is reached among the interested states.

9. During the functioning of the Tribunal, the Bureau shall serve it as a secretariat. It shall follow the Tribunal in case of its removal. The archives of international arbitration shall be deposited with the Bureau.

10. The procedure of the said Tribunal shall be controlled by the prescriptions of the Arbitral Code (Appendix B).

The text which Sir Julian Pauncefote drafted was presented at the same time, in fact before the Russian complementary note, and reads in its English text:

1. With a view to facilitate immediate recourse to arbitration by states which may fail to adjust by diplomatic negotiations differences arising between them, the signatory Powers agree to organize in the manner hereinafter mentioned, a permanent "Tribunal of International Arbitration" which shall be accessible at all times and which shall be governed by the Code of Arbitration provided by this convention, so far as the same may be applicable and consistent with any special stipulations agreed to between the contesting parties.

2. For that purpose a permanent Central Office shall be established at (X) where the records of the Tribunal shall be preserved and its official business shall be transacted.

A permanent secretary, an archivist and a suitable staff shall be appointed who shall reside on the spot. This office shall be the medium

of communication for the assembling of the Tribunal at the request of the contesting parties.

3. Each of the signatory Powers shall transmit to the others the names of two persons of its nationality who shall be recognized in their own country as jurists or publicists of high character for learning and integrity and who shall be willing and qualified in all respects to act as arbitrators. The persons so nominated shall be members of the Tribunal and a list of their names shall be recorded in the Central Office. In the event of any vacancy occurring in the said list from death, retirement or any other cause whatever, such vacancy shall be filled up in the manner hereinbefore provided, with respect to the original appointment.

4. Any of the signatory Powers desiring to have recourse to the Tribunal for the peaceful settlement of differences which may arise between them shall notify such desire to the secretary of the Central Office who shall thereupon furnish such Powers with a list of the members of the Tribunal from which they shall select such number of arbiters as may be stipulated for in the arbitration agreement. They may besides, if they think fit, adjoin to them any other person, although his name shall not appear on the list. The persons so selected shall constitute the Tribunal for the purposes of such arbitration and shall assemble at such date as may be fixed by the litigants.

The Tribunal shall ordinarily hold its sessions at (X) but it shall have power to fix its place of session elsewhere and to change the same from time to time as circumstances and its own convenience or that of the litigants may suggest.

5. Any Power although not a signatory Power may have recourse to the Tribunal on such terms as shall be prescribed by the regulations.

6. The Government of (X) is charged by the signatory Powers to establish on their behalf as soon as possible after the conclusion of this convention a permanent Council of Administration at (X) to be composed of five members and a secretary.

The Council shall organize and establish the Central Office which shall be under its control and direction. It shall make such rules and regulations from time to time as may be necessary for the proper discharge of the functions of the office. It shall dispose of all questions which may arise in relation to the working of the Tribunal or which may be referred to it by the Central Office. It shall have absolute power as regards the appointment, suspension or dismissal of all employés and shall fix their salaries and control the general expenditure.

The Council shall elect its president who shall have a casting vote. Three members shall form a quorum. The decisions of the Council shall be governed by a majority of votes.

The remuneration of the members shall be fixed from time to time by accord between the signatory Powers.

7. The signatory Powers agree to share among them the expenses attending the institution and maintenance of the Central Office and of the Council of Administration.

The expenses of and incident to every arbitration, including the remuneration of the arbiters, shall be equally borne by the contesting Powers.[10]

"This morning," wrote the first American delegate, Mr. White, on May 27, "we had another visit from Sir Julian Pauncefote, president of the British delegation, and discussed with him an amalgamation of the Russian, British and American proposals for an arbitration tribunal. He finds himself, as we all do, agreeably surprised by the Russian document, which, inadequate as it is, shows ability in devising a permanent scheme both for mediation and arbitration. During the day President Low, who had been asked by our delegation to bring the various proposals agreed to by us (the American delegation) into definite shape, made his report; it was thoroughly well done, and, with some slight changes, was adopted as the basis for our final project of an arbitration scheme."

On May 29 the detailed Russian articles on good offices and mediation were discussed in the Committee of Examination, in which the real work of the Commission was done. At that session, the second, Mr. Frederick W. Holls introduced a project for special mediation in a scheme for the selection, by disagreeing nations, of a neutral Power whose duty should be to bring them into harmony. This plan eventually made the project of mediation practical, and at the moment served to keep attention fixed on the American delegation, which was expected to keep well to the fore in advancing plans for pacific settlement.

At the third session of the Committee of Examination on May 31 it was announced that at the third meeting of the Commission on June 5 communication of the British and American projects would be formally made and it was added that both had been printed and distributed to the members of the Commission. Mr. White has told us that the American scheme was ready on May 27 and on May 30 Sir Julian Pauncefote wrote to Lord Salisbury:

I may mention that the United States delegates were instructed to present a project of international arbitration not dissimilar to mine in some respects, though hampered with provisions relating to procedure.

[10] Sir Julian Pauncefote's English text, *Conférence internationale de la Paix, Troisième Commission, Annexes*, 15–16.

It was prepared without knowledge of the Russian proposal. It will be laid before the Commission, but I am informed by my American colleagues that in view of the altered circumstances of the case, they will not press it, but support my proposal instead.

I have translated my project into French, and I will transmit the text as soon as it has been presented to the Commission.

The same dispatch contains a detailed account, practically the English text, of the British proposal, and in reply Lord Salisbury telegraphed on May 31 that "Her Majesty's Government entirely approve the course which your excellency has taken on this occasion." [11]

It was that day, May 31, that the whole matter came up in the Committee of Examination at its third session, as mentioned. Mediation had been discussed. The report of the session continues:

Before closing, the Committee acknowledges receipt from his Excellency Sir Julian Pauncefote of the more detailed project which he has had printed to develop his project for instituting a permanent tribunal of international arbitration, which he brought before the Third Commission in plenary session. This document will be printed and distributed.

Mr. Holls read in the name of the delegation of the United States:

1. The following memorandum:

"Without insisting on the exact form of their project, the delegates of the United States are ready to amend the propositions submitted up to the present time to the Conference, so that these in the end shall contain what is essential in their own plan. It seems to them that it will not be difficult—as a result of the numerous propositions which may be made, on the subject of mediation, international inquiries and special arbitration—to add a Project for a Permanent Tribunal of Arbitration, which shall include the essential points of the American project."

2. Annex No. 7 (organization of the tribunal).

It is probable that the French text of this latter document was not then prepared, for Mr. White's diary of June 1 records that, on his return that day from London to The Hague, "I found that our whole general plan of arbitration will be today in print and translated into French for presentation. I also find that Sir Julian Pauncefote's arbitration project has admirable points." He recites the provisions of the British project and adds that "from a theoretical point of view, I prefer to this our American plan of a tribunal permanently in session. * * * During the morning Sir Julian came in and talked over

[11] *Miscellaneous No. 1 (1899)*, at dates cited.

our plan of arbitration as well as his own and that submitted by Russia. He said that he had seen M. de Staal, and that it was agreed between them that the latter should send Sir Julian, at the first moment possible, an amalgamation of the Russian and British plans, and this Sir Julian promised that he would bring to us, giving us a chance to insert any features from our own plan which, in our judgment, might be important. He seemed much encouraged, as we all are."

On that same June 1 the English and French texts of the British project were received in London. The next day, June 2, Mr. White records that "during the morning De Martens, Low, Holls, and myself had a very thoroughgoing discussion of the Russian, British and American arbitration plans. * * * After a long and intricate discussion we separated on very good terms, having made, I think, decided progress toward fusing all three arbitration plans into one which shall embody the merits of all."

The American project being before the Committee of Examination as the third one of like purpose, it is now time to see what it provided. Without being essentially changed from the form in which it appeared in the instructions to the delegates, it had undergone some revision and the text, submitted to the Committee in French, reads in English as follows:

Resolved, that, with a view to aid in preventing armed conflicts by pacific means, the representatives of the sovereign Powers assembled at this Conference are invited by the present resolution to propose to their respective governments to enter into negotiations for the adoption of a general treaty having for its object the following plan, with such modifications as may be essential to secure the adhesion of at least nine sovereign Powers,[12] at least eight of which must be European or American Powers, and at least four of which must be of the number of signatories of the Convention of Paris, the Empire of Germany being considered as succeeding to Prussia and the Kingdom of Italy to Sardinia.

1. The Tribunal shall be composed of persons chosen on account of their high integrity and their competence in international law by a majority of the members of the highest court of justice existing in each of the adhering states. Each state signatory of the treaty shall have one representative in the tribunal. The members of it shall sit until successors shall have been given to them in due form by the same method of election.

[12] The text of the paragraph from here on was substituted in the revision.

2. The Tribunal shall meet for organization at a time and place to be agreed upon by the several governments. However, it shall not be later than six months after the general treaty shall be ratified by the nine Powers mentioned above. The Tribunal shall appoint a permanent clerk and such other officers as may be found necessary. The Tribunal shall be empowered to fix the place where it will meet and to change the same from time to time as the interests of justice or the convenience of the litigants may seem to require. It shall fix the rules of procedure to be followed.

3. The Tribunal shall have a permanent character and shall always be ready to receive, within the limits of its own rules of procedure, new cases and counter-cases, these cases either being submitted by the signatory nations or by any other nations which shall desire to have recourse to it. All cases and counter-cases, as well as testimony and arguments to support or answer them, must be written or printed. All cases, counter-cases, depositions, arguments and opinions expressing judgment must, after the sentence shall have been pronounced, be at the disposition of all those who may be disposed to pay the expense of their transcription.

4.[13] Any difference whatever between signatory Powers may, by common accord, be submitted by the interested nations to the judgment of this international Tribunal, but, in all cases of which the Tribunal shall be seized, the interested parties must engage, in addressing it, to accept its sentence.

5.[14] In each particular case, the court shall be composed according to the conventions agreed between the litigant nations, either that the Tribunal may sit as a whole or that the nations may designate some only of its members of an uneven member and not less than three. In the case where the court should comprise only three judges, none of them may be either a native, subject or citizen of the states whose interests are in litigation.

[13] The radical changes in this paragraph make it advisable to reproduce the original text as given in Secretary Hay's instructions. Note that the text as presented reversed the subject matter of this and the preceding paragraph:

3. The contracting nations will mutually agree to submit to the International Tribunal all questions of disagreement between them, excepting such as may relate to or involve their political independence or territorial integrity. Questions of disagreement, with the aforesaid exceptions, arising between an adherent state and a non-adhering state, or between two sovereign states not adherent to the treaty, may, with the consent of both parties in dispute, be submitted to the International Tribunal for adjudication, upon the condition expressed in Article 6.

[14] The original paragraph read:

5. A bench of judges for each particular case shall consist of not less than three nor more than seven, as may be deemed expedient, appointed by the unanimous consent of the Tribunal, and not to include a member who is either a native, subject or citizen of the state whose interests are in ligitation in that case.

6. The general expenses of the Tribunal shall be divided equally or in equitable proportion between the adherent Powers, but the expenses arising from each particular case shall be borne by those which the Tribunal shall indicate. The emoluments of the judges may be arranged in such a manner that they may be payable only when the said judges shall have effectively completed their duties in the Tribunal. The presentation of a case wherein one or both of the parties may be a non-adherent state shall be admitted only upon the condition [15] that the litigant states in common accord take the engagement to pay respectively such a sum as the Tribunal shall determine to cover the expenses of the procedure.

7. Every litigant who shall have submitted a case to the international Tribunal shall have the right to a second hearing of his case before the same judges, within three months after the sentence shall have been verified, if he declares he can invoke new testimony or questions of law not raised and not decided on the first time.[16]

8. The treaty herewith proposed shall enter into force when nine sovereign states, under the conditions indicated in the resolution, shall have ratified its provisions.[17]

All three proposals were now before the Conference, and on June 3 the Committee began its study of that part of the original Russian basis of the Commission's work which dealt with international arbitration. It was the understanding that the court proposals would be made into an additional chapter under this head, and the subject was assigned to the order of the day for the third session of the Commission on June 5 and for the fifth session of the Committee on June 7. As a matter of fact, the Commission session was devoted to adopting eight articles of the mediation chapter, except that at the beginning M. Beldiman of Rumania complained that the American project for a court had been published by the London *Times* on June 1 and by the Cologne *Gazette* the next day despite the fact that it had been marked "secret." Note was taken of the statement and the Rumanian delegate was assured that the officials had not given out the text. This had been done ad-

[15] The original from here on read:

"Upon condition of a mutual agreement that the state against which judgment may be found shall pay, in addition to the judgment, a sum to be fixed by the Tribunal for the expenses of the adjudication."

[16] The conditional clause was in the following form in the original:

"Upon presentation of evidence that the judgment contains a substantial error of fact or law."

[17] *Cf.* Scott's translation, *op. cit.*, I, 799.

visedly by Mr. White, who correctly felt that some knowledge by the public of the proposal would greatly strengthen the chances of passing it through the Conference.

On the same day Sir Julian Pauncefote, in writing to Lord Salisbury, discussed the three projects before the Committee in these words:

> I am glad to be able to report that the project which I laid before the Committee * * * has met with general concurrence, although amendments will be offered by the delegates of Russia and of the United States, who have also presented projects for a permanent tribunal. The British proposal, however, having been first announced and first presented, and being the most acceptable, will be taken as the basis of the deliberations of the Committee.
>
> In view of the opinions expressed on the subject in the Committee, the delegates of Russia, as well as of the United States, have decided to abandon their respective projects, but they intend to suggest to the Committee the incorporation into the British project of such features of their own plans as may appear worthy of adoption, and which will harmonize therewith.
>
> * * * So far as I have had an opportunity of discussing them with the Russian and American delegates, [the amendments proposed] do not appear to me to give rise to any serious objection, and I shall leave them to the appreciation of the Committee and to the approval of your lordship, which I have carefully reserved.[18]

Before examining in detail the progress of the three proposals through the Conference, it will be well to analyze them in order to see wherein they duplicate, differ from or supplement each other. Baron Descamps has done just this in his report to the seventh plenary session:

> The fundamental characteristics of the English project are the following:
>
> I. Designation by each of the signatory Powers of an equal number of arbiters inscribed on a general list as members of the court.
>
> II. Free choice made from this list of arbiters called to form the active tribunal in the different cases of recourse to arbitration.
>
> III. Institution at The Hague of an international Bureau serving as clerk to the court and providing for administrative services.
>
> IV. Institution of a permanent Council of Administration and of high control, composed of the diplomatic representatives of the Powers accredited to The Hague, under the presidency of the Minister of Foreign Affairs of the Netherlands.

[18] See *Miscellaneous No. 1 (1899)*, at date cited.

The project formulated by the Russian delegation rested on the following bases:

I. Designation by the present Conference, for the period which shall elapse until the meeting of a new Conference, of five Powers, in order that each of them, in case of a request for arbitration, may appoint a judge, either from its nationals or outside of them.

II. Institution at The Hague of a permanent Bureau with the mission of eventually advising the five Powers of requests for arbitration which are addressed to it.

The American project is distinguished from the other projects principally by the following characteristics:

I. Nomination by the highest court of justice of each state of one member of the international Tribunal.

II. Organization of the Tribunal as soon as the adhesion of nine Powers shall be assured.

III. Composition of the tribunal called to sit in each particular case in accordance with conventions to be made between the states in dispute. These conventions may call for the sitting of all members or some only, in uneven numbers—at least three members. Where the court comprises only three judges, none of them may be a native, subject or citizen of the states whose interests are in litigation.

IV. Right of states, in certain determined cases and within a certain time, to a second hearing of the cause, before the same judges.[19]

Analyzing the three projects in succession in this way, their relative merits become clear. Sir Julian Pauncefote's was the most advanced, though providing only a panel rather than a real court; the Russian and American schemes gave evidence of strong repression of desirable ideas in the fear that they might prove too strong meat for the Conference and consequently might militate against the success of the plan. The British proposal in effect presented to the Conference what it ought to do and threw the burden of proof as to failure to do it on the Conference; the other two started on the assumption that the world was ready only for a mincing step, and tried to disguise the motion involved in taking it. This is seen in the careful definition of the nine Powers in the first paragraph of the American project, a definition which was written in at The Hague in an effort to make the scheme more palatable. As a matter of fact, political science is at the present moment such an inexact science that it is not safe to call anything impractical provided it seeks an advance along recognized lines of improvement. The only way to prove

[19] Another translation in Holls' *Peace Conference*, 238–239; quoted in Scott, *op. cit.*, I, 279–280.

such a thing impractical is to see it fail, and then remember that the phœnix had a habit of rising out of its own ashes. But this is meant as a moral, not as a criticism. For we must recognize that Sir Julian Pauncefote was appealing essentially for a principle, while the originators of the other two projects were primarily seeking results; and at that time it was the part of statesmanlike wisdom to make haste slowly, and in some cases a mighty hard job to make it at all.

In the sixth session of the Committee of Examination in the *Salle de la Trève* on June 9 the general discussion on the principle of a permanent court of arbitration began. M. Bourgeois, the president, opened in his capacity as French delegate with a statement on behalf of his country. In this noteworthy speech he made several points that must be recorded. "The French delegation," he said in part, "considers that there exists between these various projects, notably between the two projects emanating from the Russian delegation and the British delegation, a similarity of principles and of views capable of serving as a basis for the discussions of the Conference. Therefore it does not believe it necessary to deposit a particular project in its own behalf. * * * It is in the same spirit of profound prudence and with the same respect for national sentiment that, in each project, the authors have abstained from putting forward the principle of permanence of judges. Indeed, it is impossible to overlook the difficulty, in the actual political situation of the world, of establishing a Tribunal composed in advance of a certain number of judges representing the different countries and sitting in a permanent manner in successive cases.[20] * * * Freedom of recourse to the arbitral court and freedom in the choice of arbiters would seem to us, as to the authors of two projects, the very conditions of success in the cause which we are unanimous in desiring to serve usefully. * * * The French delegation considers it quite possible to assign to this permanent (bureau) a more efficacious rôle. It thinks that this bureau might be invested with an international mandate, clearly limited, giving to it a power of initiative proper to facilitate in a great many cases recourse of the Powers to arbitration."

[20] True in 1899, but consider how possible it proved to be in 1907, respecting the Court of Arbitral Justice, after the Permanent Court had been functioning only five years.

Sir Julian Pauncefote read a declaration:

Before beginning the very interesting discussion which must occupy us today, I desire to take the occasion to express my thanks to my Russian and American colleagues who have graciously consented that the project for a Permanent International Tribunal of Arbitration which I have had the honor to deposit in Commission should be the basis of our deliberations. From the projects which they have deposited improvements on mine may be drawn and the Committee will appreciate their value as well as that of other amendments which will doubtless be presented to us. * * * I am persuaded that, owing to the exceptional talents which we have the advantage of possessing in the body of this Committee, we shall succeed in producing a result worthy of the mandate so nobly intrusted to the Conference by his Majesty the Emperor of Russia.

Chevalier Descamps as reporter then formally opened the discussion by making a preliminary statement. "The constitution of a permanent tribunal of arbitration," he said, "responds to the juridic conscience of civilized peoples, to the progress achieved in national life, to the modern development of international litigation, and to the need which compels states in our days to seek a more accessible justice in a less precarious peace. It can be a powerful instrument in strengthening devotion to law throughout the world. And it is a fact of capital importance that three projects of this kind have been presented by three great Powers.

"The institution of permanent arbitral jurisdictions is not an innovation without precedents in international law. For instance, the Bern Convention of October 14, 1890, contains the institution of a free arbitral tribunal, to which the German delegation, from the time of the first Conference of 1878, wishes to intrust still more important duties. Other offices of a jurisdictional character function under permanent forms in international law. The establishment of a permanent tribunal of arbitration does not present insurmountable difficulties and it may be an important factor in the international problem which is before the Hague Conference.

"The difficulties which the realization of the magnanimous views of the Emperor of Russia has encountered in other fields are another reason for us to urge forward the organization of mediation and arbitration. We must develop and consolidate the organic institutions of peace. There is on this point a general expectancy in every land, and the con-

ference can not, without serious disadvantages, disappoint it. The proportions which we shall give to the work that we are about to undertake will be, without doubt, modest; but the future will develop whatever fertility this work has for the welfare of the nations and for the progress of humanity. As for the delegates to this conference it will be, without doubt, one of the greatest joys of their lives to have coöperated in the achievement of this result,—the fraternal approach of the nations and the stability of general peace."

Chevalier Descamps added that some improvements might be made in the projects by borrowing certain provisions from the project worked out by the Interparliamentary Union, and reserved the right to bring suggestions from this source forward in the course of the proceedings. Since this was done and had much to do with the resultant practical qualities of the court, the Union's project may be considered the fourth source of the Permanent Court. Secretary Hay's memorandum indicates that it was also one of the prototypes of the American proposal. The Union's project was the product of four years' study, the subject having first arisen at the third conference at Rome in 1891, when the Interparliamentary groups were asked in a resolution to put it on the order of the day of the next conference. At Bern in 1892 Professor Hilty of Switzerland presented a proposition covering neutrality, laws of war, mediation, arbitral procedure and the rudiments of a court. This proposition was referred to a commission of six members of which the Hon. Philip Stanhope (now Lord Weardale) was reporter. He enlisted the support of Mr. Gladstone, then premier, who wrote a letter to the members of the bureau in 1893 commending the scheme. The present Lord Weardale at the 1894 conference submitted the resolutions decided on by the commission and at the sixth conference in 1895 at Brussels the project was adopted on the report of Senator Houzeau de Lehaie of Belgium. The commission was continued with Chevalier Descamps as its president and he was specially charged with securing the adoption of the scheme by the Powers, a duty which led to the preparation of the essay already several times referred to.[21]

Dr. Zorn of Germany took the floor after Chevalier Descamps had

[21] See *Union interparlementaire, Résolutions des conférences, * * ** par Christian L. Lange. Misch & Thron, Brussels, 1911, pp. 12–13, 40–42, 44–46, 53–56.

finished. He had listened, he said, with the greatest attention and profound emotion to the declarations of Messrs. Bourgeois, Pauncefote and Descamps. He realized the solemnity of this hour when the representatives of civilized states had spoken on one of the gravest problems which could be discussed. He hoped that a day would come when the noble wish of his Majesty the Emperor of Russia may be entirely fulfilled and when differences between states shall, for the most part and so far as they do not touch vital interests and national honor, be brought before a permanent international jurisdiction. But, he added, "filled as I am personally with this hope, I cannot, I must not give myself up to illusions, and such, I am certain, is the opinion of my government. We must clearly recognize that the innovation proposed for examination by the Committee is still in the state of a noble project. It cannot be realized without allowing many risks, even many dangers, of which prudence must take account. Is it not advisable to wait until preliminary experiments can be made of this order of ideas? If these experiments can succeed and if they should confirm our hopes, the German Government will not hesitate to try them by accepting the attempt at arbitration of a much more extended character than it has practiced up to the present time. But it cannot pronounce on the organization of a permanent tribunal before having previously had satisfactory experience of an occasional court of arbitration. Under these conditions, * * * I regret to have to ask a return to Article 13 of the original Russian project, for this project exactly represents the opinion of the Imperial German Government, according to my view."[22]

This statement, however it was disguised by fair words and left-handed promises of interest, was nothing more or less than an announcement that Germany intended to stick to the old order without a serious, or even a fair, attempt to improve that order. One may honestly believe a certain step is wrong and refrain from taking it without fault, but to reject out of hand a step, that one approves, simply because it has never been taken and allegedly is not yet fully enough precedented—well, is not logical. Nor did Dr. Zorn's attitude convince the Committee.

M. Asser of Holland admitted that it might be useful to make ex-

[22] This and the succeeding account of proceedings is taken, by translation or summary, from *Conférence internationale de la Paix*, IV, 18–21.

periments, but so far as concerned occasional arbitration they had already been made. Those which remained to try were precisely those that the projects under discussion proposed, since they anticipated the institution of a court to which the states would have the choice of referring without ever being obliged to do so. It seemed that the conclusion of Dr. Zorn might be less absolute and that, without receding from the opinion he had just developed with an emphasis which had strongly affected the Committee, he might abstain from opposing the establishment of a permanent tribunal of arbitration and consent to consider it, in the expression of Count Nigra, as a temporary "permanent tribunal."

Dr. Zorn did not deny the value of M. Asser's argument, but he raised more than one objection. Especially was there an indisputable difference between an occasional arbitration and the institution of a tribunal charged permanently with exercising the rôle of arbiter, following a code of procedure and rules determined in advance. Further, the German delegate recalled that the Russian Government had changed its initial project. The German Government had accepted the original Russian project, and not another, as the basis of the work. He could not at that time accept, even as a matter of experiment, the institution of a temporary "permanent tribunal" because: (1) this institution was not provided for in the initial program of the Russian Government; (2) in reality, it is very probable that the temporary permanent tribunal would not be long in becoming definitive. He therefore insisted on reserving as to the future.

Count Nigra of Italy, experienced not only as a diplomat but as a statesman, appealed directly to Dr. Zorn's spirit of conciliation and in a few words pointed out the consequences of a too absolute decision on a question which interested all humanity to so great a degree. "The impatience with which the results of our work are awaited by public opinion," he said, "is so great that it would be dangerous to refuse acceptance of a court of arbitration. If the Conference opposes to this impatience a *non possumus* or inadequate satisfaction, the fraud would be violent (*la déception serait vive*). The Conference in this case would incur a grave responsibility toward history, toward the world and toward the Russian Emperor himself." Chevalier Descamps supported Count Nigra's statement.

Dr. Zorn responded that he was extremely sensitive to these considerations and would take the most careful account of them by not abstaining from participation in the work of the Committee, but it must be understood that he could not engage his government. His formal declaration reserved his (that is, Germany's) "subsequent freedom of action." To that reserve no one could have objected in the first place, if it had been made without the accompaniment of the unfortunate discussion.

"When the Russian Government formulated its first propositions concerning arbitration," explained M. de Martens after Dr. Zorn's reservation, "it undoubtedly had in mind only the general lines of the project which it first distributed, but this project, it was well understood, was only a skeleton and necessarily allowed of numerous developments. * * * There are in the various projects under discussion provisions which could naturally provoke the fears Dr. Zorn has interpreted, but this is only a misunderstanding which it will be easy to dissipate in the course of the amicable discussion which is going to take place."

M. de Martens suggested heading the project by a provision specifically indicating the court's optional character. Sir Julian Pauncefote expressed the belief that this was already taken care of, Count Nigra suggested a change to the stipulated effect in the first article, Chevalier Descamps thought the whole question might be resolved by putting the word "free" in the court's title, and M. Bourgeois ended the discussion by saying that the Committee was unanimous in declaring that the court must not be obligatory for anybody and suggesting that, the principle being fixed, the question should be settled in its proper place in the course of the proceedings. This suggestion was accepted.

M. Odier of Switzerland nevertheless asked to support expressly the declarations of Chevalier Descamps and Count Nigra in favor of a court, and as he represented not only a neutralized but a small state it is interesting to read his words:

> More than one hope, more than one expectation, of arbitration has dawned on the world; and popular opinion has the conviction that in this direction, above all, important steps will be taken by the Conference. No one can deny, in fact, that we are able at this moment to take a new and decisive step in the path of progress. Shall we draw back, or reduce to insignificant proportions the importance of the innovation ex-

pected of us? If so, we should arouse a universal disappointment, the responsibility for which would press heavily upon us and our governments. The serious innovation which we can offer humanity is the constitution of a permanent body which may render manifest to the eyes of the world, tangible as it were, the progress realized.

Professor Heinrich Lammasch now spoke for Austria-Hungary and took the statesmanlike attitude for a delegate from a country unsympathetic with the thing proposed. If Germany had said no more it would have been fortunate and an honor to her perspicacity. Professor Lammasch said he was not opposed to consideration of the Pauncefote project as a basis of discussion, although the eventuality of a court was not indicated in the Muravev circular and, despite the fact that he could not declare that Austria-Hungary was ready to support the establishment of a permanent tribunal, which might be conceived in very divers forms according to the course of the discussions in Conference. He accepted the project as a basis of discussion so as not to hold up so important a work of the Conference and would contribute to this discussion, on the understanding that his participation should have only the character of a preliminary examination and in no wise should engage his government. Thus he responded fully both to his duty to his country and to the world.

Mr. Holls put in an appeal on behalf of the United States in which he said in part:

I have listened with the greatest attention to the important exchange of opinion which has just taken place between the representatives of different great European states. It has seemed proper to me, representing, as it were, a new Power, that precedence in the discussion should naturally be given to the delegates of the older countries. This is the first occasion upon which the United States of America takes part under circumstances so momentous in the deliberations of the states of Europe, and having heard, with profound interest, the views of the great European Powers, I consider it my duty to my government, as well as to the Committee, to express upon this important subject the views of the Government of the United States with the utmost frankness.

I join most sincerely and cordially in the requests which have been addressed to the honorable delegate of the German Empire.

Nowhere has opinion expressed itself with more energy than in the United States in favor of the initiative of his Majesty the Emperor of Russia; nowhere has opinion given rise to more ardent wishes for the

success of this Conference. By hundreds we have received communications in this sense coming not only from the United States of America but from the entire American continent; and these addresses are signed by organizations of the highest standing and with full authority.

Consequently we find ourselves bound by a kind of moral engagement, solemnly contracted not between governments but before humanity himself. Let us all, as is the tendency of us Americans, take a point of view purely practical and let us consult the world's opinion. This opinion is very impatient, as has just been said, and it is necessary to add some thing more; it is uneasy. On account of the interest, vital for it, which we have to discuss, it fears that we may reach results entirely apparent and platonic. And it is necessary to recognize thoroughly that these anxieties have their origin in the experiences of a recent past. A conference which interested all humanity, the conference on labor, has already met in Berlin under the noble and generous inspiration of the Emperor William. What was the result? Purely platonic.

Public opinion again awaits. It will not pardon us for a new disappointment and the very hopes that it places in us indicate the measure of the disappointment which the failure of our labors would cause. Undoubtedly M. Zorn is correct as to the difference between occasional arbitration and the first Russian project, but from the practical point of view, that which preoccupies opinion, I consider that we shall have done nothing if we separate without having established a permanent tribunal of arbitration.

This appeal to listen to the voice of the world was warmly supported by M. Asser, Sir Julian Pauncefote and Count Nigra, after which the articles of the Pauncefote project went under discussion.

How the project grew under the hands of the Committee and the Commission, and how the articles were finally passed without discussion in the seventh plenary session of July 25 is a narrative beyond the scope of this paper. Once the discussion was under way, the work of whipping the project into shape went on rapidly, the first reading being completed in the sixth, seventh and eighth sessions of the Committee on June 8, 12 and 21. In the twelfth session on July 1 and the thirteenth on July 3 the project had its second reading in Committee, involving considerable discussion, and there was a third reading of the whole convention as we know it in the fifteenth (first special) session on July 15, this being necessitated by a decision of the Commission to combine the several matters relating to pacific settlement of international disputes into a single convention. In the second special session on July 17 an amend-

ment by Portugal seeking to establish the court as the preferred tribunal was rejected, and a few textual clarifications were made.

The Commission took it up in the fifth session on July 17, after varied discussion on textual details, resulting in re-reference to the Committee on certain points. This session gave the Permanent Court title its first reading. The second reading and adoption took place in the Commission's seventh session on July 20, when more or less revision of a detailed character took place in Articles 23 and 24 and a long discussion occurred dealing with the facultative character of Article 27. The plenary session of July 25 brought out only the Conference's satisfaction with the work done.

So came into existence the court which is the predecessor of the one that will henceforth attract most of the attention of the public, the Court of Arbitral Justice. Since 1902 the Permanent Court of Arbitration has been in working order and has increasingly gained the confidence of sovereign states. Begun with 26 signatory states as members, the constituent convention as revised in 1907 was signed by 43 states and has been ratified by 26 states and adhered to by Nicaragua, which failed to sign at the Second Conference. But a protocol signed at The Hague on June 14, 1907, by the states contracting in 1899, provided for the reception and recording of adhesions from those states added to the Second Conference, it being determined that admission was contingent on acceptance of the work already done. In accordance with this decision, so far as related to the Convention for the Pacific Settlement of International Disputes, of which Articles 20–29 contained the provisions relating to the Permanent Court of Arbitration, the *procès verbal* of adherence was signed by 17 states. Norway and Sweden had between 1899 and 1907 separated, their joint action at the Conference of 1899 becoming effective for each; so that 44 states are now bound by the provisions of the 1899 convention. The form of this convention was very slightly changed in 1907 so far as the Permanent Court of Arbitration was concerned. Only four paragraphs were introduced and one was suppressed. Only ten textual changes were made, of which four were purely linguistic. All of the alterations were relative to technical procedure or precision in the conduct of court affairs. Abyssinia, Albania, Costa Rica and Honduras are at present the only sovereign states not

contractants to the court. The first is deficient in legal machinery, the second too new for membership, and the last two are members of the Central American Court of Justice. The court has truly become world-wide in its scope.

As to legal business, its record has been quite as significant. The court was declared formed by a note of the Netherland Minister of Foreign Affairs on April 9, 1901, and from that date until May 22, 1902, it awaited business. On the latter date the *compromis* for the first case, the Pious Fund of the Californias, was signed. From that date until the present time business has been pending in some stage all of the time, except for the period from August 8, 1905, to March 14, 1908. That period, it will be noted, included the year of the Second Conference. In the first three and a half years of the court's functioning four cases were referred to it, with two pending for some of the time. The second stage of the court may be said to begin with the *compromis* of the Norway-Sweden maritime frontier case on March 14, 1908, and from then to the present ten cases have been heard, one being compromised out of court. Two cases are pending and for a few days three have been in process.

When we consider that all of the cases coming before the court represent problems that diplomacy has failed to solve, its efficacy can be better appreciated. But each of these unsolved problems constituted a sore spot in the relations between states that has or would fester, and so have its widening deleterious influence on friendly intercourse. The mere presence of the court has in many instances prevented differences from becoming acute and so unsolvable, and its value in this indirect respect is probably greater than in the actual solution of contentions. Any question can be adjusted if the disputants are sincere in seeking a solution and the Permanent Court of Arbitration has put the burden of proof against insincerity in the effort. It has done all this because, in the first place, the world generally desired it, and, in the second place, because Sir Julian Pauncefote (later Lord Pauncefote), Russia through Frederick de Martens, the United States through John Hay, David Jayne Hill, Andrew D. White and his colleagues, Chevalier Descamps of Belgium, and the Interparliamentary Union through its project, made the possibility, desired and discussed by about 75 devoted souls through half a dozen centuries, a reality at the First Peace Conference.

Before examining the Court of Arbitral Justice, it will be well to call attention to prototypes of the Permanent Court of Arbitration, the history of one of which at least considerably affected the origin of the plans for the Court of Arbitral Justice in 1907. In the official report on the project of this convention, Dr. James Brown Scott referred at some length to Article 9 of the Articles of Confederation of 1781 under which the United States first attempted to establish a government. In it "arbitration of international difficulties between the States was established in principle and in fact. * * * Even a superficial examination of (its) provisions shows the striking likeness between the court of The Hague and its American predecessor and prototype. The history of the American court of arbitration is quickly told: it failed to justify its existence and, lacking the essential elements of a court of justice, it was superseded within ten years of its creation by the Supreme Court."[23] The American delegation in 1907 knew of this prototype of the Permanent Court of Arbitration and the knowledge of its character and history helped at that time to strengthen the new court project by indicating what to avoid in its construction. It was not, however, brought forward as a horrible example, most likely for the reason that this might have created a certain prejudice in the minds of some delegations. The other precedent is to be found in the Treaty of Vienna of 1815, Article 63. I do not know that it was mentioned at either Conference, but it may be cited in a line. The article in question ends with this statement:

> The (Germanic) Confederated States likewise engage not to make war under any pretext and not to prosecute their differences by force of arms, but to submit them to the Diet. It will attempt the method of mediation by means of a commission; if it does not succeed and a juridic sentence becomes necessary, it will be provided by a specially organized *Austregal* judgment (*Austregal-Instanz*), to which the litigating parties shall submit themselves without appeal.

The only apparent outcome of this provision seems to be described in Moore's *International Arbitrations*, 5056–5057: "By a decree of the Diet,

[23] On this interesting bit of history see the report in 1 *Deuxième Conférence*, 350; *American Addresses, etc.*, 117–118; Scott's *Hague Peace Conferences*, 1, 428–430, 460–464; 2 this JOURNAL, 776–777, 807–810, at which these further citations are given; J. C. Bancroft Davis, 130 U. S. 1-lxii; Carson's *History of the Supreme Court of the United States*, I, 66–79; Jameson's *Essays on the Constitutional History of the United States*, 3

made at Frankfort October 30, 1834, provision was made for the establishment of an arbitral tribunal, for the purpose of deciding upon any differences arising between the States as to the interpretation of the Constitution of the Confederation, or as to the limits of the coöperation accorded to the States in the execution of certain determinate rights of sovereignty. Each of the seventeen members of the ordinary assembly of the Diet was to name every three years, from the State which he represented, two eminent men, one from the judicial and the other from the administrative branch of government; and from the thirty-four persons so named as arbitrators, arbitral judges, not to exceed eight in number, and an umpire, were to be chosen, in a prescribed manner, for the decision of each difference as it might arise." [24]

DENYS P. MYERS.

[24] 23 *Br. and For. State Papers*, 1191.

[The concluding part of this article will appear in the next number of the JOURNAL.]

THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES SUSTAINED BY ALIENS ON ACCOUNT OF MOB VIOLENCE, INSURRECTIONS AND CIVIL WARS

I

It appears to be generally accepted that International Law as we know it today had its beginnings in the writings of the political theorists of the latter sixteenth and early seventeenth centuries, more particularly in the memorable treatise of Grotius which appeared in the year 1625. The works of these writers were produced during the period of so-called rationalism when the true historical view had not yet been discovered, and the precedents and examples which were cited in support of the new rules of international law were taken exclusively from Biblical or classical antiquity. Moreover, in this same period Roman law was held in high esteem, a fact which further served to focus attention upon ancient law and custom. It is not surprising, therefore, to find that many principles which had regulated international conduct among European states, especially those of Teutonic character, during the Middle Ages, were either overlooked or rejected. If we remember that these principles had been enforced by an extensive system of municipal legislation, we shall understand why the founders of international law may have regarded them as *res internæ* rather than as matters of international import. Recently, however, the problems to which these very principles were applied have become of increasing international concern and vigorous attempts have been made on the one hand to preserve a sphere of municipal jurisdiction and on the other hand to inject into our international jurisprudence the principles upon which they were based. It shall be my purpose to show the early development of the rules which regulated the question of responsibility for aliens, how they were rejected by the early publicists and what effect they had upon later developments in our international law.

The responsibility of a state for aliens appears in its most rudimentary

form among the early Teutonic nations; not, indeed, in the form of an international responsibility, but either as an individual or a group liability. Very clearly, in the earliest times, the alien, as a clanless individual or outlaw, was without any of the existing personal rights. He had no "wergeld," he was not entitled to the peace and protection of the locality, and if by chance he enjoyed even liberty of person it was only by sufferance and in amelioration of the harsh laws which gave the local lord title over his person, as *feræ naturæ*. How long these practices survived, we cannot say, but certainly the growth of a *Gastrecht* so common among primitive peoples was not long in superseding the ancient customs. This *Gastrecht*, or rights of hospitality, gave a certain quantum of protection to the foreigner and was exercised more particularly as a form of patronage of a lord over aliens. In its operation it was narrow, for it was confined usually to members of other clans and was not generally applied to the clanless individual. In so far as we may regard this inter-clan relation as having any international significance, it was one of purely municipal sanction.

With the growing consciousness of a political life beyond the confines of the clan came a change in the status of the alien. Thus, as early as the sixth century we find that among the Salic Franks and later among the Ripuarians and the Chamavians there grew up an individual responsibility for the murder of domiciled and transient foreigners. This extension of right, in itself of no little importance, was further strengthened by the principle of royal protection which appears first among the Langobardians. Indeed it was this principle which later became the pivot upon which the rights of aliens were to turn.

The growth of alien rights was not, however, confined to the continent. In England, the Anglo-Saxons early developed both the individual liability for the murdered alien and the protection of royal authority over such individuals. Originally "bote" appears to have been made to the *gildegenossen* and the king in equal shares, but by the time of Cnut II, the royal protection was fully developed. Again in the *Dunsaete*, a species of international agreement between the Welsh and Saxons, we have a mutual responsibility provided for in case of murder of the citizens of one contracting party by the other, this responsibility to be enforced by a system of reprisals.

The relation of early law to our present problem is perhaps not quite clear. *Prima facie*, it would seem that these matters of responsibility for injury and the incident of royal protection were purely within the sphere of municipal law. We must remember, however, that the municipal law of this time had in a certain degree an international significance. It is true that these characteristics were essentially objective, but all subjective international law predicates the objective fundament which is necessary to its existence. This is distinctive of international law in its primitive manifestations, for such indeed it is in all its practical operations and effects.

The protection of the king over aliens was of even greater significance. In its inception it was primarily the exercise of a personal prerogative of the monarch, a right which was assumed to be inherent in him and for which he was rewarded by the escheat of lands of deceased foreigners. Later a great many of these matters of personal privilege came to be regarded as belonging to the sovereignty which was inherent in the royal position. This change in the conception of the source of sovereignty, which may have been due, in some measure, to the influence of Roman law concepts, brought with it a concomitant change in the idea of protection which, like the sovereignty, was henceforth supposed to rest in the people. It is to be noted, however, that this protective function of the sovereignty restricted itself to the passive protection of aliens and only later developed into the more active protection of its subjects abroad. It is to be noted that at this time we are dealing with a right and not with a duty which the protective function later developed into. This was, perhaps, because it was a manifestation more of internal than of external sovereignty, a condition which continued to the time of the early publicists.

The second phase in the development of the law of responsibility is the substitution of a group responsibility for that of the single individual. This change appears to have been general on the continent and in England. In England this was due to the legislation of both Danes and Normans, who seized upon the hundred group as a convenient agency for imputing the liability for murdered foreigners. The responsibility of the hundred was very definitely extended in the reigns of Edward I and Edward III and of succeeding monarchs, to comprehend not merely

injuries to foreigners from certain acts of felonious character, but also damages arising to subjects in general from such acts as well as from riotous assemblages.

On the continent the development of group liability was more or less irregular. In Spain the early introduction of Roman law appears to have inhibited the growth of the Teutonic law, but it was far from reversing all the existing jurisprudence, for the individual responsibility of early Gothic law seems to have persisted even to the present day. In the Empire, Bavaria and Brunswick retained laws of group liability, and in the customary laws both of Germany and France the ancient tribal laws underwent some development, but in nowise was this so well defined as in England. This was not due solely to the differences in political constitution, but to external factors of which the long foreign wars in which the continental countries were almost incessantly engaged were the most important. These wars gradually brought about the old identification of alien with *hoste*, especially in France, which in turn seems to have influenced the Teutonic countries. In the former state, however, the group liability does not seem to have fallen wholly into desuetude, at least in its application to domestic conditions.

With the identification of alien and enemy the time-honored custom of royal protection lost its significance, and in its stead arose the onerous laws of *naufrage* and the *droit d'aubaine* which placed ever-increasing burdens on the alien. The foreign merchant alone appears to have enjoyed protection, and, indeed, chiefly in the Empire. The legislation in the form of market peace and special courts was general in nature and developed independently of the customary law which, by the introduction of the civil law, was falling into disrepute. But the germs of the group responsibility still existed which later grew into the existing systems of France and Germany.

Such, in brief, was the general state in which Grotius found the law. He had before him on the one hand a well-developed system of jurisprudence regulating the status of aliens in accordance with the old Teutonic law; and on the other hand a system which appeared in its general tendencies to be growing in harmony with the legal system for which he stood. Moreover, he seems to have been of the opinion that the whole question of foreign rights was more or less a local problem and

one which was of little international consequence. But there were a few principles in regard to responsibility in general which he laid down as fundamental. These principles which Grotius introduced were based on the old private law concept, that no one was responsible for acts of others unless there were fault on his part. The element of fault might be caused by complicity, by bad counsel or by various other reasons, but most of all by complicity in the face of some act which was not legal. Thus, he says,[1] "a civil community, like any other community, is not bound by the act of an individual member thereof without some act of its own or some omission." He goes on to say, however, that rulers may share in service of others, "by their allowing and their receiving." [2] The former is in cases where the ruler knows of the offense, has the power to prevent but does not: "so that he who could have prevented is held bound if he did not do so, and that the knowing here spoken of is considered as combined with willing, and that knowledge is taken along with purpose, for he is blameless who knows but cannot prevent."

I have already indicated the fact that Grotius looked upon responsibility as a matter of municipal law and for this reason he gave little attention to the question. It is not easy to conjecture to what extent this was true, but one passage may be taken as reasonable evidence in point He says, "Nor if either soldiers or sailors contrary to command do any damage to friends, are the kings liable, which has been proven by the testimony both of France and England that anyone without fault of his own, is bound by the acts of his agents, is not a part of the Law of Nations by which this controversy must be decided, but a point of the civil law. * * *" And again, "* * * the delicts of individuals which regard their own community should be left to that community and to its rules to be punished or passed over as they choose. * * *" But even Grotius recognized the limits of local responsibility. For, says he, "* * * there is not the same power left to them in delicts which in any way pertain to human society in general; for these other states and their rulers may be prosecuted, as in particular states there is a prosecutor of certain offenses which anyone may put in motion; and much less have they such a power in offenses by which another state or

[1] Grotius, *De Jure Belli ac Pacis*, Whewell ed., Lib. II, XXI, p. 342.
[2] *Ibid.*, p. 342.

its ruler are especially assailed; and in which, consequently, the state or the ruler, have, on account of their dignity or security a right of exacting punishment as we have said. This right is not to be impeded by the state in which the offender lives, or its ruler."

I am not prepared to say that Grotius was particularly concerned with the status of aliens when he wrote the above passages. But whatever was his intention, succeeding generations of publicists pounced upon these views, and with but little change they have persisted until the present day. The real significance in the Grotian theory lies not so much in this, as in the fact that he was the first to draw the line of demarkation between municipal and international control of these matters, and thereby set in motion the great conflict between those holding for municipal regulation and those who contend for international regulation of responsibility.

Pufendorf was the first definitely to extend these passages to cases involving injuries to aliens. Close in his footsteps followed Vattel, whose views in these matters, although practically built on the writings of the preceding publicists, are those which appear to have definitely formed the basis of international practice in the early nineteenth century. At any rate, he applied the Grotian principles to aliens even more explicitly than his precursors.

According to Vattel, the sovereign, if he does not prevent injury to a foreigner by his subjects, is not less guilty than if he had committed the act himself. But, as it is manifestly impossible even in the best regulated states for the sovereign to have absolute control over his subjects, it would be unjust to impute to the state every delict committed by the citizens thereof. Consequently, injury by subjects of a state are not necessarily to be regarded as an offense on the part of the state. As it stands, this principle contains a quantum of truth, although I believe that Vattel wished to convey the idea that, *prima facie*, the state would be liable. Advocates of non-liability, however, have extended the meaning of these passages beyond their original significance. Thus Calvo and his apostles have used these arguments to excess, accepting as fundamental truths matters which in reality are only partly true.

This indirect responsibility becomes direct as soon as the state approves or ratifies the act. Such approval makes the individual act a

delict on the part of the state. As for reparation, Vattel, not distinguishing between satisfaction and compensation, believes in an individual responsibility. The state, he thinks, should compel the transgressor to give compensation or should punish him. Failing to do this, the state itself becomes responsible. Apart from this single contingency the state is not liable.[3]

The practical application of these principles was not realized until after the first quarter of the nineteenth century. The reasons for this are apparent. In the first place, there existed in most of the leading European states some local form of group or individual liability, such as the hundred responsibility in England, the communal responsibility of France, or the individual liability of Spain. Such provision for cases of mob violence or insurrection was generally regarded as sufficient. Moreover, it was not until the beginning of the nineteenth century, when the nationals of states were recognized as possessing certain rights and privileges, that nations began to demand with some consistency protection for their subjects abroad. The feeling began to take root and grow, that mere local reparation to the injured alien individual was not actually a settlement of the international prejudice which would be sustained by the injury to the individual, that something more must be forthcoming. Then, too, local justice was not always as favorable in cases of injured aliens as it might be, a fault which international law might remedy. But whatever the reasons were, it soon became apparent that the Grotian-Vattel principles of responsibility were a two-handed sword, wielded in their more extended connotation by the adherents of international responsibility as represented by the claimant states, and just as freely invoked in the more restricted phases by those who believed in non-responsibility. Nor did the contest limit itself to the mere interpretation of theoretical problems, but it became a very active competition between municipal and international law regulation, a contest which has persisted even up to the present day.

II

It is fundamental to our discussion that the character of responsibility in the problems at hand is primarily one at public law. I realize that a

[3] Vattel, *Law of Nations* (ed. Chitty), vol. II, c. VI, p. 161, *et seq.*

private law treatment of the question dates back to the times of Grotius, but this tradition is the more to be deplored when we consider that it is in this very matter where lies the weakness of the Grotian theory. The responsibility of a state for injuries sustained by aliens in civil commotions, never assumes a real character at private law, although at times it is difficult to distinguish the private from the public law aspects. Wherever matters which might give rise to international responsibility are settled by the application of private law rules, and such cases do arise, we may safely say that there has never existed an actual responsibility at international law, although the potentialities for such were present.

Responsibility in its international connotation presupposes the violation of some norm of international law, and at the same time, though less directly, a capacity to violate and to be injured. On the question of to whom and by whom in international law responsibility is imputable rests the truth or fallacy of the public law treatment of responsibility. We know that international law is to be regarded as the totality of rules or principles which governs the mutual relations between states, and that the individual, in so far as his interests are concerned, is only the object of the rights and duties of the state. So, assuming that it is the international duty of a state to protect the subjects of another state, if the former state fails to administer this duty properly it has violated a rule of international law for which its responsibility may be engaged, not, indeed, to the injured individual, but to the state of which the individual is a subject.

Apart from mere treaty stipulations, we may regard as a settled rule of international law the fact that a state has the international obligation to accord certain rights and privileges to the subjects of another state. The international law in this regard is supplemented by the municipal law which prescribes the mutual relation of aliens and nationals. From this double legislation proceeds a double responsibility, one, a responsibility between states, the other a responsibility between state and individual. The dangers of confusing the functions of these two fields of jurisdiction are apparent, and from here proceeds much of the disorder which appears to surround the question of responsibility. But there is yet another great source of confusion arising from the character

of the injury which is the result of the illegal act for which the state is responsible.[4]

The injury occasioned by the illegal act consists more in the character of the act *per se*, than in the result of the act. This is due to the peculiar nature of international law, the fact that its force is potential rather than positive, and, again, from the fact that the injury is usually more a moral than a material injury. The injury itself may be a two-fold violation of right. That is to say, it may be a subjective or an objective violation of right. In the latter case it is a matter of municipal cognizance, in the former of international jurisdiction. States have thought that in satisfying the injury by their own law the other injury, from whence proceeds the violation of international law, has been fully repaired. But this is manifestly impossible. International delicts are not of such a nature that they may be satisfied by local remedies.[5]

From the obligation of responsibility which arises from the injury proceeds the duty of reparation. This duty may be either one of satisfaction or one of compensation. The former is very distinctly a reparation to the injured state, and usually consists in a formal apology or the salutary punishment of offenders or some similar act. Compensation on the other hand is always a money payment. In theory it is an indemnity to the injured state, not to the individual, although in actual practice either method is followed. It is important to note that reparation, no matter in what form it is made, is always to be regarded as the concrete expression of an assumption of liability and can exist only when such liability has been acknowledged. Although the making of reparation may be *prima facie* evidence that responsibllity has been acknowledged, there is no excuse for the statements that "aliens shall receive

[4] Space does not permit a discussion of the illegal act, and its relation to the determinate subjects. These are two elements which responsibility presupposes. The third element is the injury resulting from the illegal act.

[5] It is worth while indicating the peculiar nature of the infraction of an international norm. The violation proceeds primarily from the injury, as I have indicated, and not from the illegal *act* itself. This explains in some measure the fact that, although the injury which gives rise to a violation is in reality objective in character, it is treated as if it were a purely subjective violation of right. This subjective character arises from the dual character of any injury which gives rise to an international obligation. Similarly in municipal law we may have an act which gives rise on the one hand to a civil liability and on the other to a criminal responsibility.

indemnity under such and such circumstances." This is mistaking cause for effect in a way not particularly creditable to the publicist who makes it. Payment of indemnity to the injured individual is *res internæ*, that is, it is a matter which the injured state settles with its injured subject as it sees fit. The mere fact that the parent state is not obligated by any rule of international law to turn over indemnity to its injured subjects would indicate that such obligation can exist only by virtue of its own laws. The distinction between reparation and responsibility is a vital one, and one upon which we must insist if we are to discuss the problem adequately.

So much for the general theory of responsibility. Let us next ascertain to what extent these principles are applicable to cases where responsibility arises in cases of civil commotion. In the first place, we must recognize the fact that there are obligations imposed on a state by international law in regard to the rights and privileges of aliens, apart from their purely conventional status. These rights are of two sorts, absolute rights and personal rights. The personal rights are matters regulated by municipal law. The absolute rights of aliens are regulated by international law, and are not so much rights of the alien *per se*, as they are rights of the state of which the alien is a subject. In their narrowest sense these rights are merely those of being protected in person and property, but the growth of treaty regulation of these matters has greatly extended the privileges of aliens. For our purposes, however, it is sufficient to assume these limited rights.

In so far as the absolute rights of aliens are really an extension of right to the state, we may regard them as being in some measure a recognition, or, perhaps, an expression, of the right which the state has of protecting its subjects abroad. This right is the converse of the duty of protecting aliens, and is as distinctly a manifestation of sovereignty, as the duty of protection is a surrender of these rights. It is for this reason that I am not inclined to regard either one of these rights or duties as an incursion into the fundamental principle of the independence of states. As a general rule, we rarely find a sovereign right abridged that there is not some concurrent extension of sovereignty.[6]

[6] The right of protection abroad depends in a large measure on the intimacy of the relation existing between the state and subject. This relation is regulated by munic-

From its very nature, the right of protection must express itself through the diplomatic channels. Many writers are, therefore, inclined to regard this right as one which should be invoked only in cases of dire necessity, when all ordinary means of obtaining justice have been exhausted, or in exceptional cases which do not admit of municipal settlement. Such an attitude betokens an ignorance of the fundamental character of the contingencies which give rise to responsibility and the invocation of right of protection. We must once more point out that in cases of injury in civil war or insurrection, the violation is not of individual right, but of state right. Obviously situations of this sort are not to be settled by local remedies.

Leaving for the moment the consideration of these questions of obligations and duties, we may consider the question of responsibility of the state for mob injuries as distinguished from injuries the result of insurrection or civil war. Mob injuries to aliens are almost always a distinct injury to the state itself. That is to say, mob outbreaks against aliens are usually motivated by anti-foreign sentiment which is to be regarded as an attack upon the state of which the alien is subject. Such, for example, was the general character of the anti-Italian outbreaks in the United States. The responsibility of the state is engaged more for this reason than for any other, although there is a large class of writers which seeks to attribute to the fault of the government injuries resulting from acts of mobs. This view is not generally maintainable. The most perfect police system is neither omniscient nor omnipotent. Mob violence is from its very nature swift and unexpected, and for this reason, admitting the propriety of a private law concept, it is wrong to impute a fault when one never existed.[7]

But if we admit that, as a general rule, liability is created by injuries to aliens in mob outbreaks, and yet that there is no fault on the part of the state, we are led to the conclusion that there may be a responsibility without fault. It is clear there may be injuries done to aliens without the knowledge of the state and hence without the possibility of the latter preventing such injuries. May we say that under these circumstances

ipal law. From this point of view we may regard the right of protection as a duty as well.

[7] The error has its roots in the Grotian misconception of responsibility.

the state has actually committed a fault? If we accept the view that when the state has used due diligence it is not to be held at fault, there seems to be no reason whatever for imputing such fault to the state, although there still exists the situation where responsibility may be claimed. The Aigues Mortes affair and the Fortune Bay case are examples in point. In both of these cases there was no possibility of claiming that the government was at fault, yet in both instances responsibility was acknowledged and indemnity paid. Responsibility, therefore, in cases of mob violence cannot be said to depend upon the fault or degree of fault of the state, but it proceeds from the nature of the facts in the case.

The problem of responsibility in cases of civil war or insurrection are of infinitely greater difficulty, not only because liability is not always clearly defined, but on account of the many important points of jurisdiction and of sovereignty which are involved.

As a general rule, the stock argument against the presumption of liability is that a state is not bound to accord greater rights to aliens than it would grant to its own subjects. This is the view held by Pradier-Fodéré, Calvo and others. Thus, says the latter publicist, "To admit in this case [internal strife] the responsibility of governments, that is to say, the principle of indemnity, would create an exorbitant and pernicious privilege essentially favorable to powerful states and prejudicial to weaker nations, and to establish an unjustifiable inequality between nationals and foreigners. * * *"[8] To his aid he invokes the principles of independence and sovereignty.

A second ground for non-responsibility is found in the idea that the state is not responsible when the outbreak is the result of *vis major*. This is essentially the view of Fiore, who also adheres to the *due diligence* view.[9] The concept of *vis major* is a doctrine of municipal law which has been transferred to international jurisprudence to enable a state to escape liability where it otherwise would be responsible.

Hall[10] is the chief exponent of the third view in regard to non-liability. It is his idea that the state is not liable on the ground that when an alien

[8] Calvo, *Le droit international*, Vol. III, p. 142.
[9] Fiore, *Le Droit international Codifié* (Antoine ed. 1911), p. 326, *et seq.*
[10] Hall, International Law, p. 231.

settles in a country, he does so at his own risk. He must be prepared to accept the results of civil war, "because the occurrence is one over which, from the very nature of the case, the government can have no control." He is also of the idea that a state is not bound to do more for aliens than for its own subjects. This same theory of risk has been ingeniously converted by the adherents of responsibility in the shape of the so-called *risque étatif*. This is intended to supplant the theory of fault, and on the theory *ubi emolumentum ibi onus esse debet* the state is responsible for the injured alien. It may extricate itself from this responsibility by proving the fault or negligence of the victim.[11]

Such, in brief, are the three chief arguments against responsibility. Our next inquiry shall be in regard to their actual value as arguments against non-liability.

No nation would be inclined to demand from another nation greater privileges for its subjects residing in the latter state than the nationals of such state themselves enjoy. Nor has it the right, apart from treaty stipulations, so to do. All that it can demand is that its subjects be treated in accordance with the norms of international law. What these rights consist in we have already seen and that a violation of them is an injury to the state, for which the responsibility of the offending state may be engaged, the concrete expression of which is in reparation. This duty, we repeat, is to the injured state, and not to the injured individual. In fact, as we have seen, the injured individual may not receive any part of the indemnity. If he receives indemnity and the nationals do not, this is merely an *incidental* inequality, which cannot be said to have any effect in international law, for, in principle, the aliens injured receive the money from their own state and not from the state where they were injured. The indemnity is part of a relation between state and state and the individual rights are merely objective. This fact would seem to add weight to the view that reclamations should be made through diplomatic channels and that the aliens need not be compelled to settle the matter of reparation themselves by local judicial process.

[11] Apart from these three main arguments against responsibility there are some writers, who, adhering to the theory of fault, believe that it must be met by a civil responsibility. These writers have been led astray by the existence of municipal law regulation of responsibility.

Should they do so, it would appear that they would thereby extinguish any rights which they would enjoy under the protection of their own state. In short, as far as regards the alien individual, a new status is created, but local settlement can in nowise affect the international injury. On the contrary; for the relation between the states would not be affected by a private action in a municipal court, no more than would a civil action in a municipal court bar the right of the state to prosecute criminally.

A civil war as *vis major* is primarily a question of fact. As a rule it is looked upon as the interposition of violence proceeding from human agency of such a character as to be uncontrollable by the entity against whom it is directed. Sometimes it is held to be synonymous with "Act of God." It is in general difficult to look upon civil wars and insurrections as cases of *vis major*, for these are matters from which it is obviously impossible to exclude absolutely the element of will. This doctrine is one to be invoked only in exceptional cases depending upon the circumstances of the case, but these circumstances must be grave and overwhelming. Thus the War of Secession in the United States is a good example of a civil conflict which was generally regarded as a case of *vis major*. Of course, the fact that the civil war itself is not a case of *vis major*, does not preclude certain incidents during the insurrection from being so regarded.

In spite of the certain quantum of truth which exists in the theory of risk both in its individual aspect and in that of the *risque étatif*, the basic assumption in both cases is wrong, in that it is founded on the question to whom the advantage of an alien settling in a given state accrues, which is not in itself a particularly tenable ground. The alien settling in a country, unless it is known to be in a state of fomentation, assumes no risk. International law has given him the right of protection in person and property by the states in which he is settled, and just as far as this right extends he cannot be said to have assumed a risk.

The *risque étatif*, on the other hand, is based on the somewhat dubious grounds that an alien settling in a country is a direct benefit to the state. At any rate, we have here the exact condition of discrimination between aliens and nationals, against which so many writers have fulminated. Apart from these considerations, however, a further objection exists in

the fact that its private law character is with difficulty translated into one of public law. This is likewise true of this theory in its individual aspect.

This completes the discussion of the three main arguments against non-liability which I have endeavored to show are dependent upon circumstances. Other theories have been advanced, namely, that the state is not bound to the impossible. *Nemo tenetur ad impossible.* This theory is based on the fiction that in revolutions and insurrections injuries are not to be prevented and that hence the state should not be held liable. This is the old theory of fault in a new coat, which we have already disposed of. It may be mentioned in passing, however, that the problem of responsibility is not to be settled by the mere application of some time-honored legal maxims. Despite the fundamental truth inherent in these principles, to apply them with axiomatic rigidity is a matter requiring great caution.

When and why is the state responsible, and what exceptions are there to these rules? There are two cases in which the liability of a state is practically absolute: first, for its own direct acts, and secondly, for the acts of its agents. The state, as any person at law, is responsible for its own acts. This is a proposition which no one would deny. The responsibility for acts of its functionaries, be these administrative or judicial, rests upon a personal basis, rather than a material one, as in the case of responsibility for acts of private individuals. The relation to the individual concerned rather than the act itself makes the state responsible. Another distinction of importance is the question of responsibility for acts done within and without the scope of an officer's agency. Acts within the scope of an officer's agency, if in contravention to the principles of international law, will be regarded as acts for which the government is responsible. An exception should be made, however, in cases of military commanders when responsibility will be primarily a matter of circumstance, depending on the nature of the acts. The enactment of statutes by which a state denies responsibility for acts of its agents, are without international sanction and are an unjustifiable attempt on the part of the state to extricate itself from its international obligations. As regards acts without the scope of an officer's agency, these can no more give rise to an international obligation than can a

burglary or hold-up. Municipal law should provide means of recovery against such individuals. International complications arise where such legislation is lacking, and not from the acts themselves.

A second class of cases which may engage the responsibility of a state are those for which a government is held liable by the laws of war. These acts, committed by military officers with the sanction of the state, are essentially acts of the state. It is important to note, however, that the government will be liable only for the grosser acts of war.

Whether or not a government is responsible for the acts of rebels is one of the great controverted questions of responsibility. There are two contingencies in which the state is clearly not liable. First, when the insurrection has reached such a serious stage of development that the whole armed force of the *de jure* government is engaged. Thus, in the United States, the great Civil War is to be cited as the best example of this sort. The state, moreover, is not responsible when the belligerency of the insurgents has been recognized. This we shall presently discuss more fully. Apart from these exceptions, I do not think a state may, in general, escape responsibility for acts of insurgents. Certainly, if another state has not recognized the belligerence of insurgents, they cannot address themselves to the organs of the insurrecto government, and must turn to the *de jure* government, which remains the only body charged with the accomplishment of international duties toward foreigners. I do not wish to be understood as laying down these principles as absolute. Insurgents are in no way under the control of the government, and it is manifestly impossible for the *de jure* government to be responsible for all acts of insurgents. A cogent argument for responsibility is the fact that a state may avoid liability for insurgents' acts by simply recognizing their belligerency. But until this is done the insurgents are yet dependents of the government which pretends to exercise authority over them. As regards the acts of war of insurgent forces, the responsibility, as in the case of the *de jure* government, is always a question of fact, but generally speaking is responsibility in the same measure and degree.[12]

[12] The arbitrations of the question will bear me out in this. Despite the great conflict of opinion even here, the general opinion is that there is no escape from liability in the circumstance I have indicated.

The responsibility for rebels which we have discussed is based on the presumption that the rebels are defeated. In case, however, the insurgent government should become the *de jure* government, the responsibility for acts of rebels is clear. The new *de jure* government is responsible not only for its own acts, heretofore the acts of rebels, but also for the acts of the previous government in virtue of the fundamental principle of political science *forma regiminis mutata, non mutatur civitas ipsa.* A new government can never escape liability for the acts of its predecessor, for these are acts of the state which continue despite all reversal in actual form of government.

To these general rules we must make certain important exceptions. In the first place, the state is not responsible when an alien has lost his nationality ("heimatloses" individual). Obviously an individual who settles in a country *sine animo revertendi* is entitled to no greater protection by his former state than the nationals of the insurrected country. Nor would he be entitled to protection when the act by which he was injured was the result of his own imprudence or fault. Treaty stipulations exempting states from responsibility will also exclude reclamations by states whose subjects have suffered injury. There has been considerable discussion regarding the merits and demerits of the treaties, but although they may lack in international expediency, the signatories will be bound to their terms.

We have already indicated that recognition of belligerence of insurgents relieves the parent state of obligations for acts of insurgents. Finally, we may mention the fact that aliens cannot claim protection of a state when they enter a part of country which is notoriously in a state of upheaval or when the *de jure* government has expressly decreed that persons entering such country do so at their peril. The presumption will be when an alien enters a country so conditioned that he has done so from motives of personal gain and therefore at his peril.[13]

So much for the nature of the international responsibility of the state. I believe that I have established the fact that the responsibility of the state is the rule, and non-responsibility the exception. For a long time this principle has been disregarded by states, but the growing intricacy of international relations has brought with it a closer coördination of

[13] The theory of risk enters here.

theory and practice. Some states will doubtless adhere to views of non-responsibility, but a change is inevitable when they come to a realization of the fact that these problems cannot be adequately contemplated by municipal law but must be reserved for public international law cognizance.

III

The fact has already been remarked upon that the problem of responsibility for aliens injured in civil uprisings became of practical international significance only after the first quarter of the nineteenth century. Historically, it may be regarded as an outgrowth of the whole movement for individual rights which culminated in the French Revolution. When states realized that their nationals possessed domestic rights and privileges, they began to insist upon a certain observance of these rights by other states when their subjects ventured abroad, and, *vice versa*, to extend these same rights to aliens within their own jurisdiction. Attempts to apply in practical cases the well developed theories of the early publicists were made during the Napoleonic wars, notably the French Privateer case of 1811,[14] but it was not until the revolutionary disturbances of the thirties that we find cases of significance arising.

The Absolutist excesses in Portugal in the latter twenties and early thirties appear to have included a number of mob outrages on British subjects as presumable adherents of the Constitutionalists.[15] The British Government demanded reparation; the Portuguese Government attempted to equivocate, but threats of reprisal brought a speedy compliance.[16] In the subsequent reconquering of Portugal by the Constitutionalists, there were a number of instances of injury to British subjects, but apparently no reparation was made. The French Government, however, fared better. An expedition under Admiral Roussin was dispatched to the Tagus to demand reparation for injuries to French subjects. The Portuguese were defeated in a naval engagement, and besides losing their fleet were compelled to pay a considerable indemnity.[17]

A more important affair which is indicative of the advanced stand

[14] Moore, *Digest of International Law*, VI, p. 809.
[15] 18 British & Foreign State Papers, 43, esp. p. 103–4, Case of M'Kenna & Munro.
[16] *Ibid.*, 268.
[17] *Ibid.*, 395.

which Great Britain took in matters which concerned the safety of her subjects in foreign lands, was the celebrated Don Pacifico case.[18] The facts are too well known to require more than brief mention. Pacifico, a British subject, residing in Athens, was the victim of mob violence in April 1847. An outburst of anti-Jewish sentiment resulted in an attack on his dwelling by a mob, who were even aided or abetted by the police, to an alleged damage of over £30,000. Pacifico, it appears, presented a claim to the Greek Government, but despairing of having it recognized, appealed to the British Government. A lengthy correspondence ensued. The Greek Government insisted that Pacifico should present his case to a local tribunal, while the British Government was equally certain that it was a matter of diplomatic cognizance. The Greek Government failed to make reparation and a pacific blockade of the Greek coast was instituted. New complications arose as a result. France offered to mediate, and after considerable dispute the matter was arbitrated. Pacifico was allowed 150 pounds as damages for certain claims he had against Portugal, the papers relating to which the mob had destroyed. The Greek Government later paid in cash about two thirds of his original claim.

The Pacifico case was prolific of opinions on the question of responsibility. Palmerston, in a speech before the House of Commons, June 25, 1850, came out squarely in favor of responsibility, but it does not appear that he based his views more upon theoretical grounds than he did on the exigencies of foreign policy. At any rate, his views were those consistently followed by Great Britain in all subsequent cases.

Another case of reclamations against Greece occurred in 1862. The Greek Government acknowledged its liability and promised compensation.[19] The French and Austrian Governments also recovered for injuries to their subjects.[20]

The revolutionary claims against Tuscany and Naples are so well known that no discussion is necessary. For a long time, due to the inaccuracy of M. Calvo's statements, it was supposed that the notes of Schwarzenberg and Nesselrode were the law in matters of responsibility.

[18] 39 Br. & For. St. Pap., 332, *et seq.*
[19] 58 *Ibid.*, 1009.
[20] *Ibid.*, 1142.

The British Government never accepted these opinions in any form and has never acted on them. Nor has any other government, as far as I know, except as it wished to escape liability for its transgressions.

In 1870 a claim by Great Britain [21] was repudiated by Spain on rather technical grounds. One Jencken, in Lorca on professional business, was attacked by a mob and was very severely injured. The pretext for the outrage was some barbarous superstition. The Spanish Government punished the perpetrators, but as to the British claims it pointed out that Jencken had renounced indemnity in the local courts and therefore could see no grounds for making compensation.

This case is interesting in that it seems to indicate that an express renunciation of right in a local court is held to cancel the international claim as well. On the strict grounds of principle this view is not tenable, although as a practical fact it is probably true enough and affords a striking instance of the inconsistency of theory and international practice. Another fact worthy of notice is that none of the cases thus far cited came up squarely on the question of responsibility, but they seemed to turn upon the question of compensation. This is evidence of the rather undeveloped state of the new theory of responsibility which seems to have taken definite shape as such only after the European adjustments in 1870.

Many publicists are inclined to believe that, although the more powerful states are in favor of responsibility when they themselves are making reclamations, when the situation is reversed they hold entirely contrary views. In some cases their views are justified, but this has not been true of Great Britain. The Fortune Bay case of 1878 is evidence in point.[22]

A number of American fishing vessels while fishing on a Sunday in Fortune Bay, Newfoundland, were attacked by native fishermen, who destroyed the boats and nets and expelled them from the bay. The United States demanded reparation on the grounds that they were fishing within the limits and privileges granted by the Treaty of Washington and that local legislation which prohibited Sunday fishing could not abridge their treaty privileges. The British Government took exception

[21] 62 Br. & For. St. Pap., 985.

[22] For. Rel. 1878–81, Correspondence with Great Britain.

to this interpretation,[23] but the United States insisted that, irrespective of the question of treaty interpretation, compensation was due for violence suffered. The claim was finally settled on these grounds.

The German view in regard to responsibility is the same as the British, although it is to be noted that no cases have arisen in which the responsibility of the German Government has been claimed. The so-called Salonica incident was the first case involving the German Government.[24] A number of officious persons had forcibly carried off a Bulgarian girl to prevent her from embracing the Mohammedan religion. The populace of Salonica, enraged at the proceeding, threatened to attack the American consulate, where the girl was hidden.[25] When the excitement was at its height, the French and German consuls appeared on the scene. They were surrounded and murdered.

The German and French Governments demanded reparation. The Turkish Government forthwith admitted its responsibility and dispatched an investigatory commission to the scene. The ringleaders were tried and condemned and the consuls buried with honors. An indemnity was paid to the families. Apart from the fact that the injured parties were both consuls, a circumstance which would not of itself entitle them to any greater amount of consideration than ordinary aliens,[26] the attack was palpably an attack on the consuls, not as representatives of a particular state or nationality, or as foreigners as such, but because they were Christians. This would, perhaps, suggest a further basis for responsibility than has heretofore been mentioned. As a general rule, however, these contingencies are covered by the rules already laid down.

A recent case of some moment involving German rights was the first of the so-called Casablanca incidents. In July, 1907, a number of Europeans employed on a railroad at Casablanca were murdered by Moorish rebels. Quiet was soon restored, but shortly thereafter a French cruiser arrived and, against the wishes of the local consuls, landed a small and inadequate force of marines. The fears of the consuls were realized. A riot broke out and the inhabitants were joined by wild

[23] 72 Br. & For. St. Pap., 1267.
[24] *Staatsarchiv*, 30/333, 33/108.
[25] The American consul was absent at the time. For. Rel. 1876, 569.
[26] Consuls do not enjoy the immunities of diplomatic officers in these matters.

tribes from the hills. The French cruiser opened fire on the town, and when the French and Spanish reinforcing fleets arrived the French vessels continued the bombardment. There was considerable loss of life and property, for the town was practically wiped out.

The German interests in Casablanca were considerable and within a short time the French Government was requested to make reparation for the injuries suffered. The French Cabinet issued a note (10 September, 1907) [27] in which they decided that the Government of Morocco was to be responsible for the murder of July 30, as well as for the injuries resulting from the plundering and suppression of disorders. The indemnities were to be fixed by a commission, and the Minister of Foreign Affairs was charged with the execution of these matters.

This case illustrates what has been said before, namely, that the exigencies of modern international policy are compelling a recognition of the law of responsibility. Certainly in this case it was on account of the extraneous influences upon the responsible government which constrained an acknowledgment of liability. It will be remembered that the events just narrated followed close on the heels of the Algeciras acts. It is doubtful if under different circumstances France would have been as amenable to German claims. Germany's position has been further emphasized by South American and Chinese cases.

Up to the present point in the discussion we have not come to cases of conflict of municipal and international law. In France, where exists an elaborate system of communal responsibility, the interrelation of the local and international law is much closer. The law of communal responsibility in its modern form dates from the days of the French Revolution, although, as I have indicated, it is probably of much greater antiquity. Shortly after the July revolution in 1830, the Court of Cassation declared the law of communal responsibility inapplicable to cities of the size of Paris, and by its decision excluded claims of responsibility from local cognizance. In this particular case a special law was passed to meet the exigencies of the situation. The sum of 2,000,000 francs was placed at the disposal of the government for the settlement of claims arising out of the revolutionary events of that year.[28] It is im-

[27] 54 *Journal de Droit International Privé*, 1257.
[28] 30 Duvergier, *Lois et Collection*, 138.

portant to note that this law was not designated as "*secours*" or aid in the sense in which M. Calvo has understood it.[29] This characteristic of aid applied only to those injured or wounded in defending the cause of the republic. Persons whose property had been injured were to be indemnified by the state.

The indemnifications furnished by France at the close of the revolutionary upheavals of 1848 were also of importance. By a presidential decree of 24 December, 1851, a special fund of 5,000,000 francs was created to settle claims. The decree pointed out, however, that the state was not under a legal duty to do this but was acting in accordance with the dictates of equity and political safety.[30]

After the establishment of the third republic, a very different situation presented itself. Here were losses resulting not only from the Prussian war but also those which were incident to the excesses due to the Communist regime. On the basis of a report by a commission of the Assembly, 100,000,000 francs were voted to be distributed pro rata among the departments. This sum was later supplemented by an appropriation of 120 million and finally by one of 50,000 francs. It is clear that no attempt was made to distinguish between the two types of losses. Nor does any distinction appear to have been made between the claims of aliens and nationals. The only point of interest in the whole affair is that the budget commission expressed itself as having no intention of creating a right to indemnity nor of sanctioning a state debt, although it did distinguish the claims arising from injuries received at hands of regular troops in the reconquest of Paris.[31]

These three cases have been cited, not so much because they are illustrative of any comprehensive development in the theory of responsibility, but because they laid a certain basis for the practice of France in the years following, for, although the general tendency in France even as early as the year 1830 appears to have been to recognize the principle of responsibility, yet, as we have already noted, the question does not seem to have been of any particular moment until after the second half of the nineteenth century. Nor are these cases to be looked upon as

[29] III Calvo, *op. cit.*, 150.
[30] 51 Duvergier, *op. cit.*, 538.
[31] Calvo, *op. cit.*, III, 154.

expressions of republican generosity such as frequently are to be found in successful revolutions. The Privateers case of 1811,[32] the Pastry War claims against Mexico in 1838 and again in 1866, and the Japanese case of 1868 are all evidence of the degree to which France was willing to carry her convictions on the subject of responsibility. Inasmuch as the other cases mentioned will be discussed further on, let us examine the facts in the Japanese claims case of the year 1868.[33]

Free entrance to the harbor of Osaka had been granted to France by treaty. The corvette *Dupleix* was commissioned to make soundings of the passage and for this purpose despatched its steam launch up the coast. The following day came the news that the launch had been attacked by a mob and everyone on board had been killed or had disappeared. Only two men survived the massacre. The consuls of the Powers at once withdrew from Osaka and the French Government demanded an acknowledgment of liability by the Japanese Government. This was immediately forthcoming. "They [the Japanese Government] recognized the fact that our men were exempt from all blame, that the massacre was without possible excuse and that a signal punishment was necessary." [34] The Japanese Government carried out its promises. The offenders were executed, an official apology was read on board the *Dupleix* and an indemnity of 150,000 piasters was paid to the French Government.

We have already seen that a no less determined stand was taken by France in the celebrated Salonica case. And so, too, in the question of claims against Spain for the injuries resulting from the Carlist rebellion of the seventies.[35]

The facts are familiar. Queen Isabella was driven from her throne in 1868 and for the next five or six years Spain was the scene of the worst internal strife. The party supporting Alfonso, son of the late Queen, finally emerged successful. During the revolution, the adherents of Don Carlos had operated in the vicinity of the French border and the injuries to the French subjects in these regions were considerable.

[32] Moore, *Digest*, VI., p. 809.
[33] *Staatsarchiv*, 16, p. 119; *Archives Diplomatiques*, Ser. 1, 33–4, p. 601.
[34] *Staatsarchiv*, 16, p. 121.
[35] *Cambridge Mod. Hist.*, XII, 258.

France requested reparation for the injuries and losses. The Spanish Government, in view of the law of individual liability which existed there, at first refused to consider the request and indicated that the injured parties might sue the perpetrators of the outrages for damages. Settlement was finally made by special law in consideration of a cross-payment by France for the injuries which Spanish subjects had sustained in Algeria.[36]

The Spanish claims against France are worthy of mention.[37] In June, 1881, Spanish colonists settled in South Oran, Algeria, were the victims of the incursions of Arabs. Spain demanded reparation, but M. Barthélemy-Saint-Hilaire, Minister for Foreign Affairs, replied that, although the French Government had reason to follow the events in Algeria with solicitude, in cases of this sort the government had never distinguished between nationals and aliens, and that the latter enjoyed the same benefits from measures of reparation as the nationals. "Measures of reparation evidently could not proceed from a legal obligation." The events in Saida were to be classed among those inevitable happenings to which the inhabitants are exposed, as, for instance, the devastation of a plague, events which could not engage the responsibility of a state.[38] Finally, he pointed out that the Spanish had denied their responsibility for insurrection, on the basis of the same "universally consecrated theory." Nevertheless, he agreed that if Spain would indemnify France the latter would make similar concessions. M. Barthélemy-Saint-Hilaire neglected to mention that France's claims against Spain had not been in accordance with his "universally consecrated theory." The Spanish Government did not avail itself of this inconsistency, however, but, as we have seen, was amenable to the French claims.[39] The present case was clearly one of an eye for an eye, and, for this reason, whatever expressions of principle were made, were not of great importance. In fact, when, in 1893, Brazil availed itself of Berthélemy-Saint-Hilaire's dictum, France protested vigorously and finally compelled payment.

[36] *Archives Diplomatiques*, 1882–3, p. 120; *Jour. Privé*, 1888, p. 293.
[37] *Arch. Dip.*, 1882–3, III, p. 57; I *R. D. I. P.*, p. 177.
[38] *Arch. Dip.*, Ser. 2, Vol. 7, p. 59.
[39] France's share, 900,000 fr. *Arch. Dip., loc. cit.*, p. 71.

A situation similar to the previous one arose in 1893 as a result of the well known "Aigues Mortes Affair." A certain company of Aigues Mortes, a small town near Marseilles, employed a number of Italians in its works. On August 17, 1893, a quarrel broke out between these men and the French employees, which, assuming more and more serious proportions, grew into a veritable pitched battle in which most of the inhabitants of the town participated. Order was restored by the arrival of regular troops, but not until a number of natives had been wounded, and some Italians killed, and 26 wounded. Although extensive investigations were carried on, the blame was not to be fixed on any one party, but the basis of the whole trouble appears to have been that the company employed a preponderating number of Italians.

The day after the riot the Italian ambassador presented his remonstrances to the French Government. Deep regret was expressed, but nothing appears to have been said on the subject of reparation. But before proceeding to discuss this problem, let me briefly review the events in Italy following the riot at Aigues Mortes.[40]

The disturbances in Italy were confined chiefly to hostile demonstrations against the French in Rome, Naples and Genoa. In Rome a mob collected before the French embassy and, in spite of the resistance of the police, hurled stones and blazing paper through the windows of the palace. In Naples and Genoa the mobs attacked the consulates and French business houses and the cars of the French tram line were derailed and burnt.

The Italian Government was the first to claim liability. It informed the French Government that reparation by France would be complete when a just indemnity had been paid. Previous to this despatch, however, the French Government had of its own accord offered to indemnify Italy. No mention of non-responsibility was made and the offer was accepted by Italy.[41]

The French claims amounted to 50,000 francs and were examined first by a joint commission which, however, dissolved without coming to any conclusion. The matter was finally settled through the regular diplomatic channels.[42]

[40] *Ibid.*, p. 173; *Arch. Dip.*, Ser. 2, Vol. 49, p. 37 *et seq.*

[41] Amount of 420,000 fr.

[42] *Archiv. Dip., loc. cit.*, pp. 47–8.

The Aigues Mortes affair is one of the most notable cases of recent years, and is especially to be remarked upon for the fact that there was no talk of a "universally consecrated principle" or "spontaneous liberality." The case is not to be explained, certainly, on the grounds of international equity alone, but may be said to have been in some measure the result of the delicate European situation existing at the time.

Since the Aigues Mortes affair, France has been involved in a number of minor cases which raised the question of responsibility. The most important of these was the Barcelona riots case of 1909, which, by the way, is one of the most recent cases in which the question of responsibility has been raised.

It will be remembered that the riots of 1909 were brought about by the popular dissatisfaction with the government's Moroccan policy. Attempts to mobilize troops resulted in strikes, riots and insurrections and all the accompanying excesses of mob passion. This was most particularly the case in Barcelona and Catalonia. The uprisings were finally quelled, but only after considerable loss of life and property had occurred.

The French losses had been especially heavy in Barcelona. A monastery had been destroyed for which France claimed indemnity of 87,379 pesetas. A similar sum was demanded for another outrage of the same sort. Besides this there were six other minor claims entered.[43] We have already spoken of the Spanish law of individual liability in cases of this sort. As a rule this law had been supplemented by special act, as in 1881, where the claimants were not otherwise to be satisfied. Leaving out of consideration the question of international injury which was involved in these cases, it was palpably impossible for the injured parties to recover in the present case, for the Barcelona insurgents were laborers or insolvents from whom nothing could possibly have been collected. During an interpellation of the Minister for Foreign Affairs on December 24, 1908, in this matter, M. Pichon, the Minister, said the following significant words:[44] "That, as has been already shown, there exists no international jurisprudence in regard to the responsibility of states where events occur in civil or political trouble. The law varies with the state, certain states recognize responsibility, others do not."

[43] *Jour. Pr.*, 37, 1139. [44] *Ibid.*, 1140.

In September, 1910, the Spanish claims were still in the diplomatic channels and, as yet, there has evidently been no settlement.

Let these cases of responsibility in which French interests have been involved suffice for the present. Clearly, France has taken a position favorable to responsibility and in only one case, the Spanish claims of 1881, has shown a tendency to recede therefrom. This view of the French Government is, as we have seen, in accordance with that adopted by both Great Britain and Germany. Other European states have likewise sanctioned the same principles, notably Italy and Spain. The position taken by Italy in the Aigues Mortes affair has been consistently maintained in most of the cases where she has claimed responsibility or it has been claimed of her. In 1906 [45] an Italian soldier belonging to the Italian force occupying the Island of Crete was injured at some election troubles and later died. The Italian representative ordered the occupation of the region where the killing had occurred and claimed an indemnity, to which end he ordered the sequestration of customs revenues in the region under Italian control. The Cretan Government gave way to this rather extraordinary pressure and paid an indemnity of 20,000 francs.

Spain, on the other hand, has not been as decisively in favor of the view as the other European states, but upon several occasions where Spanish citizens have been injured in the Americas, Spain has expressed herself emphatically for responsibility.

An interesting situation exists at present between Spain and some of the European Powers. In 1912 England, France and Germany presented claims amounting to over 100,000,000 francs for injuries sustained by their respective subjects during the various Cuban insurrections.[46] Previous to this and shortly after the Hispano-American war, similar claims had been presented, but Spain had declined to entertain them, on the ground that no nation could be obliged to indemnify except for the acts of government troops. The situation was peculiar in Cuba, for most of the outrages and excesses were those of insurgents with whom the regular troops had been unable to cope. Subsequently, the three governments presented claims to Cuba, but at the same time insisted

[45] 13 *R. D. I. P.*, p. 223. The soldier was evidently not on duty.
[46] 39 *Jour. Pr.*, 675.

that Spain should share the responsibility because of the impossibility of distinguishing the acts of regulars and insurgents. Since then, the claims have again been presented to Spain, but no action has as yet been taken.

We have yet to consider two cases involving Russia which would indicate that, despite the progress which has been made in the theory of responsibility, there is still some basis for the contention of M. Calvo that the theory favors the strong and is prejudicial to weak nations.

In 1905, Switzerland made claims of Russian responsibility for injuries received by a Swiss subject in the Russian disorders of that year. The Russian Minister for Foreign Affairs replied as follows:

> The Imperial Government cannot assume the liability for the indemnification of the Swiss citizen injured. In short, injuries of this sort occasioned either by individuals or bodies of individuals should be reimbursed by the persons recognized as the guilty parties by competent judicial authority. It is generally understood that this principle does not exclude the responsibility of functionaries who might be convicted for neglect of duty, in regard to the suppression of disorders. Consequently, the aliens injured have full and entire right of instituting actions against each individual or official whom they believe to be guilty, without the Imperial Government as such guaranteeing indemnification to injured aliens. In view of these ideas, the latter cannot pretend to enjoy privileges Russian subjects themselves are not entitled to.[47]

The Russian Government clearly was inclined to regard the subject of responsibility as within the field of municipal cognizance rather than as a matter of international law, at least as regards claims made against herself. The exact opposite of this view appears to be maintained as regards injuries to Russian citizens. The following quotation from the *Journal Privé* will illustrate the point at issue.[48]

> The Prince Salar-ed-Daouleh, who occupied new Kermanchah, paid at the request of the consul of Russia 7000 tomeins as indemnity to Russian subjects for injuries sustained by them during the disorders in that city.

Fortunately for the theory of responsibility, cases of this sort are decreasing in number. States can no longer freely repudiate liability. Responsibility has become in Europe a recognized fact of international

[47] 1905 *Rapport du Conseil Fédéral*, p. 300. [48] 39 *Jour. Pr.*, 686.

law, and states are gradually coördinating theory and practice to an ever-increasing extent. During the last quarter of a century a mass of precedents has been accumulating which point to a theory of responsibility, and, after all, it is these precedents and the practice of states which is the determining factor as to what is and what is not international law.

IV

We have seen how in Europe there has been a steady progress during the last half century toward a theory of absolute liability for injuries sustained by aliens in civil commotions. Most of the cases we have mentioned, however, have been among the European nations themselves and chronologically have been rather remotely separated. Turning to the countries of Latin America, we are confronted by a new situation. Here, uprisings and insurrections are of such common occurrence that to a large school of publicists and jurists it has seemed impossible to hold a state responsible for the injuries which aliens are constantly subjected to. These writers have attempted therefore to develop a scheme of non-responsibility which will meet the exigencies of the turbulent situation in these countries, and have attempted to justify their view both theoretically and on the basis of international precedent. We have already examined the theoretical arguments which they advance, and it yet remains for us to inquire into the cases which have arisen.

The movement, in Latin America, toward non-responsibility has not been confined to publicists and jurists alone, but has been repeatedly voiced by prominent statesmen of those countries. And this they have had ample opportunity to do. The number of revolutionary uprisings in the South and Central American states has been truly remarkable. Nor are these outbreaks to be looked upon as frivolous and sporadic in character. Many of them have been conflicts of great moment and have affected important interests. The flagrant disregard of life and property so common in these states has justified the European governments in adopting vigorous measures, and confirms to some extent the view which they have taken that the Latin American states have not yet such a degree of political development as to trust the destinies of foreigners in

their hands. At the same time, however, we must not forget that many nations have abused their position, and have availed themselves of the thunderbolts of diplomatic intervention when there was little or no excuse for their so doing.

The claims which are most frequently made against the Latin American states are conveniently divided into three classes. First, claims made for injuries arising from acts of oppression, unjust imprisonment or mob violence. Secondly, claims for injuries sustained during civil wars and insurrections. Thirdly, claims for violations of contract obligations. It is with the first two classes alone with which we shall have to do.

The Latin American states have shown considerable ingenuity in devising schemes to avoid liability for injuries to aliens. But to all appearances these have been of no avail. They have repudiated the theory of responsibility not only in their diplomatic correspondence, but in their statutes, their treaties, and even in their constitutions. From a purely political point of view, the position of the Latin American states may be regarded as a protest against indiscriminate intervention by European states. It is an effort, moreover, to maintain the privileges of equality of states and the inviolability of territorial sovereignty. From the juridical standpoint, however, we see in this attempt at repudiation of the theory of responsibility, a final effort to regulate the liability of the state by municipal legislation. This in turn may be in some measure understood as a heritage of the mother country which, in the course of development, has taken a new direction.

Although it is the purpose of the present paper to study merely the international aspects of the question of responsibility, yet the interrelation of municipal law and international law is so close in these states that it becomes necessary for us to consider to some degree the extent and effect of these municipal measures. Let us consider, in the first place, the constitutional provisions.

In general, the constitutional provisions are of three sorts: those which repudiate responsibility, those which deny the right of diplomatic intervention and, finally, those which insist that alien parties contracting with the government shall not resort to diplomatic intervention. Taken up in their existing chronological order, the earliest of these constitu-

tional provisions is in the Costa Rican Constitution of 1871 which provides merely, that aliens and nationals shall seek redress for injuries or damages before the courts.[49] This provision was rather general in nature and was evidently not aimed at diplomatic intervention alone. In contrast to it, however, we have the provision from the Guatemalan Constitution of 1875 which provides that [50] "neither Guatemalans nor foreigners shall have indemnification for damages arising out of injuries done to their persons or property by revolutionists." This is evidently the first constitutional denial of the right of aliens to claim responsibility for injuries. It was followed in 1886 by the Salvadorean Constitution, which has a similar provision, and further stipulates that no compact shall be entered into modifying the constitutional provision.[51]

The Haitean Constitution of 1889 [52] likewise limits the right of reclamation and gives the victims of revolutions the right to sue at law for damages. The Honduras Constitution of 1904 [53] also is positive on the matter and even goes to the extent of providing for the expulsion of individuals who fail to observe the provisions of the Constitution. The Honduras Constitution was closely followed by the Nicaraguan fundamental law of 1905 which has in effect identical provisions.[54] Finally, the Venezuelan Constitution of 1909 [55] has incorporated similar provisions, provisions which it has embodied in its Constitution for the last generation.[56]

Another type of constitutional limitations may be found in the Constitutions of Ecuador,[57] Colombia,[58] Paraguay,[59] Cuba,[60] and Panama.[61] These take the form of stipulations that aliens shall enjoy the same civil

[49] Rodriguez, *American Constitutions*, Vol. I, p. 332, Art. 46.
[50] *Ibid.*, p. 238.
[51] *Ibid.*, Art. 46, p. 268.
[52] *Ibid.*, Art. 185, Vol. II, p. 85.
[53] *Ibid.*, Art. 14 & 15 Vol. I, p. 362; Art. 142, p. 388.
[54] *Ibid.*, I, pp. 301–2.
[55] Mss. kindly furnished me by Pan American Union.
[56] So 1904 and 1901 and 1891.
[57] Art. 37, *Ibid.*, Vol. II, p. 283.
[58] Art. 11, *Ibid.*, Vol. II, p. 321.
[59] Art. 33, *Ibid.*, Vol. II, p. 388.
[60] Art. 10, *Ibid.*, Vol. II, pp. 144–5.
[61] Art. 9, *Ibid.*, Vol. I, p. 394.

rights and constitutional guarantees as nationals. The Constitution, while apparently granting rights to aliens, at the same time by the doctrine of implied powers denies them other rights, for clearly, if nationals have no right to make reclamations, certainly aliens have not either.

In connection with this discussion of constitutional provisions, it is a fact worth noting that these constitutional limitations are to be found in those countries which more than any others have been subjected to almost continuous reclamations by foreign states. None of the Latin American countries which we generally consider as maintaining a more settled political life, have embodied rules of this sort into their Constitutions. It is true, however, that some of these nations have had recourse to other methods, notably statutory and treaty stipulations. Let us briefly consider some of the more important of these laws and decrees.

A great number of statutory provisions has been the direct result of some civil war. More particularly has this been true of Venezuela and Colombia. The former state was one of the first to resort to this *modus operandi*. In 1873, at the close of the memorable revolution in Venezuela, the reclamations of injured aliens were so numerous, that in a vain attempt to deny its responsibility the Venezuelan Government issued a decree that: [62]

> neither domiciled foreigners nor wayfarers have the right to resort to diplomatic channels, unless when, having exhausted legal resources before the competent authorities, it may clearly appear there has been a denial of justice or notorious injustice.
>
> Foreigners do not possess the right to demand indemnification from the government for the losses or injuries proceeding from the war, except in such cases as Venezuelans possess it.

It must be noted, however, that a further decree modified the manifest severity of this law and gave to claimants a fairly wide latitude of reclamation. But, despite this fact, the Venezuelan decree is a landmark in the history of responsibility, for, as I have said, it is one of the first forceful and outspoken repudiations of responsibility in statutory form. Four years after the issuance of this decree, the Colombian Government passed a law regulating the same question.[63] It is true that it was slightly

[62] 74 Br. and For. Stat. Pap., 1065.
[63] 68 *Ibid.*, 776.

more liberal, in that it recognized certain claims proceeding from injuries by revolutionists, but made these claims cognizable only by local courts. Foreigners' claims were not to be treated as claims of foreigners as such, except in respect to deprivation of property.[64] The British Government made a vigorous protest against this law in a note addressed to the Colombian Government on January 3, 1878 [65] and as a result a new law was passed, July 1878, giving administrative authorities the jurisdiction.[66] This law was further amplified by decree.[67]

Another important series of statutes was enacted in Colombia in 1885, following another uprising. Strangely enough, the first decree recognized the fact that the problems arising out of this civil war were ones which gave rise to international responsibility. The claims of foreigners were given into the hands of a mixed commission.[68] A supplementary decree [69] of 1886 stipulated, however, that the government was not necessarily responsible for losses sustained by aliens at the hands of rebels. In the following year came another amendment which apparently sought to limit the responsibility of the government for the acts of the officers of the *de jure* government as well. This decree enumerated the acts of officials for which the republic would hold itself liable, but denied responsibility for the same acts when committed by the rebels, except where responsibility was found to be recognized by international principle or was found to be the practice of the civilized world.[70] In view of the cases which we studied, it would appear that this latter phrase completely nullified the preceding provisions.

During these years other states, notably Salvador, Costa Rica, Mexico and Ecuador, enacted comprehensive legislation regulating the status of aliens. In the main, these provisions were very similar to the constitutional provisions which we have already examined. The Salvadorean law,[71] which put aliens on a footing with nationals and denied the right

[64] 68 Br. and For. Stat. Pap., p. 778.
[65] *Ibid.*, p. 776.
[66] 69 *Ibid.*, p. 376.
[67] *Ibid.*
[68] 76 *Ibid.*, p. 566.
[69] 77 *Ibid.*, p. 807.
[70] 78 *Ibid.*, p. 53.
[71] 77 Br. & For. Stat. Pap., p. 121.

of diplomatic intervention, was protested by both Great Britain and the United States.[72] The United States insisted that the question was one of international law, and that furthermore decisions of national tribunals did not bar international remedy. The Salvadorean authorities did not attempt to maintain the position aimed at, but declared that the law referred "only to claims which have their origin in acts of the judicial authorities and not to claims that are founded upon an anterior act of the gubernative authority." [73]

A not dissimilar controversy arose over a Costa Rican law promulgated in the same year. The law, which was in its essentials the same as the Salvadorean, was again protested by the United States. It was pointed out, that "a municipal law excluding foreigners from having recourse to their own sovereign to obtain for them redress for injuries inflicted by the sovereign making the law, has in itself no international effect." [74] The United States insisted, moreover, that it had a right to claim when it saw fit to do so.

The Mexican law of this year had identical provisions to those of the other countries whose laws we have considered. No protest was made against these provisions.[75]

The law in Ecuador, at first fairly liberal, in that it vested the government with discretion to recognize certain claims for equitable reasons,[76] was stringently amended in the year 1888, following a civil war. The government refused to be responsible either for acts of insurgents, or for the military operations or acts of repression and measures of security resorted to by the government.[77] This decree aroused considerable disapproval in the diplomatic circles. The diplomatic corps protested in a collective note to the Minister for Foreign Affairs on August 29, 1888, informing him that pending instructions they would act on the principle that the international law of a state could not alter the principle of international law to the prejudice of aliens.[78] When the Presi-

[72] 77 Br. & For. Stat. Pap., p. 116.
[73] For. Rel., 1887, p. 114.
[74] *Ibid.*, 1887, p. 99.
[75] 77 Br. & For. Stat. Pap., p. 1270 *et seq.*
[76] *Ibid.*, p. 728.
[77] 79 *Ibid.*, p. 731.
[78] *Ibid.*, p. 166.

dent communicated this note to the Chambers, they refused to modify or amend it in any way. The President resigned but his resignation was not accepted.[79] Four years later, the Ecuadorean law was changed.[80] The new law did not attempt to deny the responsibility of the government for official acts but it limited liability to such cases alone. Diplomatic recourse was not expressly denied, but aliens were forbidden to resort to methods not open to nationals.

In 1893, a comprehensive law was enacted by the Guatemalan Congress,[81] one whole section of which (Sec. VI) was devoted entirely to the question of diplomatic intervention. Liability was limited to acts of officials and diplomatic recourse was to be allowed only in cases of denial or of delay of justice. A similar law slightly more attenuated was passed in 1895 by the Honduranean Legislature.[82] But neither this nor the previous laws were protested. In fact, experience proved that most of these laws were impracticable in operation. At best they were to be looked upon as an expression of governmental policy which would be carried through if possible, but, if not, the administration would be willing to recede.

A situation of this sort existed in 1903 when Venezuela attempted a statutory regulation of the matter.[83] This law was merely an incident in the existing movement to escape liability for the civil war of the previous years, which culminated in the pacific blockade. The right of reclamation was limited as in the other statutes which we have examined. The article relating to diplomatic intervention is interesting, and is worth quoting.[84] It provided:

> That neither domiciled foreigners nor those in transit have the right to have recourse to diplomatic intervention, except when legal means having been exhausted before competent authorities it is clear that there has been a denial of justice or a notorious injustice has been done, or that there has been an evident violation of the principles of international law.

It is evident that the apparent rigidity of this law is qualified by the

[79] For. Rel., 1888, p. 491. Nothing further is noted.
[80] 84 Br. & For. Stat. Pap., p. 644.
[81] 86 *Ibid.*, p. 1281.
[82] 87 *Ibid.*, p. 703.
[83] 96 *Ibid.*, p. 647.
[84] Art. 11, *Ibid.*, p. 648.

last phrase. For, what is a violation of international law, if injuries to aliens in civil war are not? And who, indeed, are the judges in this matter? Certainly not the officials of the country making the law. This was perhaps the feeling of the diplomatic corps at Caracas, which met to discuss the question of remonstrating. No decision was reached by them and apparently the matter was dropped.[85]

A new type of statute appeared in the year 1908 [86] which, although it does not expressly deny liability or the right of diplomatic intervention, insists that no treaty shall be signed which seeks to place foreigners in a better position than the nationals themselves enjoy. Moreover, it directs that treaties shall limit the right of diplomatic intervention by describing the bounds in which diplomatic officers may act, and that endeavor shall be made to introduce into such treaties the principle of non-responsibility.

Apart from any argument as to the merits of treaty stipulation of this sort, it seems strange, that, in the face of general international opposition, Salvador should have passed a law of this sort. If, however, we regard this statute as a final stand of the theory of non-responsibility, we can at least explain if we cannot justify its existence.

These laws must suffice us for our study of statutory regulation of the question of responsibility. As I have said before, these statutes have been purposeless as far as any practical effect has been concerned. Both the European states and the United States have expressed grave disapproval of these acts, a disapproval which on various occasions has taken the shape of formal remonstrance. To such the Latin American states have invariably been amenable, but they stand as a man by the right which they declare they possess, namely, to regulate as they see fit the question of responsibility. This leads us to the mention of the movement for a so-called American international law, especially as it has found expression in the acts and minutes of the various Pan-American Congresses.

At the first Pan-American Congress held in the year 1890,[87] the committee on claims and diplomatic intervention recommended that resolu-

[85] For. Rel. 1903, p. 806.

[86] *Ibid.*, 1908, p. 706. This is the first statute of the kind which I have found. It is possible that similar ones preceded it.

[87] International American Conference Repts. of Committees, Vol. II, p. 233

tions be adopted to the effect that foreigners were entitled to equal rights with nationals, but that beyond this no nation had any obligations or responsibilities. This is the familiar equality doctrine which we have already examined and found wanting. The projected resolutions received the unanimous support of the delegates with the exception of those of the United States. Mr. Trescot, the United States representative, pointed out that to adopt these principles would be to exclude absolutely diplomatic reclamations and that cases of this sort were better handled by tribunals unaffected by the partialities and prejudices of municipal courts.

At the second conference,[88] the question came up and found expression in a number of resolutions. A convention was finally adopted which, predicating the doctrine of equality, came out squarely for a system of non-responsibility except where officials failed to comply with their duties. Alien claims were to be presented to the local courts alone, and diplomatic recourse was to be had only in case of denial or delay of justice, or when there had been a manifest violation of the principles of international law.[89] At present, all the states represented, except the United States, have become signatories to this convention.

Prima facie, it would appear that these rules would put an end to all diplomatic recourse, but this is not in reality the case. It will be observed that a reservation was made of all manifest violations of international law. This convenient phrase will permit of almost any latitude of interpretation as, for instance, was the case in Salvador in 1887. It is difficult to comprehend how these conventions will alter in any material way the practice even of the signatories.

The problem of pecuniary claims was further settled by a convention which provided that they were to be submitted to arbitration when of sufficient importance and when they could not be amicably adjusted through diplomatic channels. As was pointed out in the third congress held at Rio de Janeiro, this stipulation precluded all but the claims of major importance from being settled in the way suggested.[90] The United States ratified this convention.

[88] *Actas y Documentos de la Segunda Conferencia*, p. 830.
[89] *Ibid.*, p. 854.
[90] Third Int. Am. Conf. Minutes, etc., p. 181.

A criticism of this movement may not be out of place at this point. Although from many points of view an attempt to formulate more definitely an "American" international law is highly laudable, yet it is to be condemned if it has as its mission the subversion of principles which have repeatedly received the sanction of the great Powers. To build up a legal system which is in direct conflict with the existing customs and precedents may prove in its consequences a destructive instead of the constructive force which it pretends to be.

A point which may have been noted and which is of some importance is the fact that the movement among the Latin American states in so far as it affects the problem which we are studying has been essentially objective in character, that is to say, efforts have been directed more against the method of presentation of claims than against the problem of responsibility itself. I think this is due in large measure to the way in which most states have comprehended the whole question, a fact which leads to no little confusion and inaccuracy. This stands out even more clearly in the treaties which Latin American states have concluded in their attempt to divest themselves of responsibility.

The earliest treaty may be traced to the year 1863 (Bolivia and Peru).[91] This treaty, although it antedates the efforts at constitutional limitation of liability, was not the first attempt at regulation. In 1852 the Venezuelan Government, in connection with a proposed modification of American public law, had included a provision by which claims of foreign governments for injured individuals would not be received. To pave the way for an *entente* on this subject Señor Guzman was sent to various capitals, but apparently the proposal did not materialize.[92]

Other treaties soon followed the treaty noted above. It is not my purpose to discuss or to enumerate these provisions inasmuch as this was ably done by Mr. Harmodio Arias in an article in this JOURNAL for October, 1913, page 724. The list which is there given is complete but for the addition of a treaty between Italy and Paraguay, August 22, 1893, Article 3,[93] and Bolivia and Chile, May 18, 1895, Article 5.[94]

[91] 55 Br. & For. St. Pap., p. 837.
[92] 4 *R. D. I. P.*, note, p. 227.
[93] Martens, *Nouveau Recueil Général de Traités*, ser. II, Vol. XXII, p. 50.
[94] *Ibid.*, Vol. XXIV, p. 396.

We have already seen that the Institute of International Law in its 1900 meeting expressly condemned this sort of treaty-making and in the rules which it drew up it recommended that states refrain from such practices. This was a very serious condemnation of the Latin American movement, and, coming as it does from foremost publicists, indicates that there is a total lack of international precedent upon which such treaties might be based. We do not, however, condemn the latter solely for this reason, but because they are aimed at the subversion of an important international principle. It is true that they affect primarily only the contracting parties, but the moral influence which such treaties may exert is certainly considerable. For example, two states might agree between one another not to prosecute acts of piracy which subjects of one state might inflict on the other. Certainly, the fact that such an agreement was limited to the signatories would not neutralize the demoralizing effect which the treaty might have not only upon international jurisprudence but upon the whole civilized world. So it is with the theory of responsibility. It is true that these treaties have in many instances proven of no practical effect, but the tendency is none the less dangerous and might pave the way to a discreditable practice among states.

We turn next to the international practice of the Latin American states as it has been illustrated in the almost overwhelming number of cases which have arisen. We must perforce confine ourselves to the leading cases which have been of distinct constructive value, keeping in mind the points which have already been noted.

With the exception of the celebrated "Pastry War" between France and Mexico, none of the cases prior to 1850 are of any value to us, for it is only with the second half of the nineteenth century that the questions of responsibility reached the dignity of international conflicts, and it is only then, moreover, that the Latin American states began a more concerted and purposeful resistance to the theory of international responsibility. Let us briefly examine the Pastry War case.[95]

Like other Latin American countries, Mexico since her independence had been prey to continuous insurrection during which considerable losses had been sustained by foreigners, more particularly by French

[95] 27 Br. & For. St. Pap., p. 1178; H. H. Bancroft, Works, Vol. 13, p. 187.

subjects. The basis of the relations between France and Mexico was a provisional treaty which had never been signed by Mexico, and for this reason no attention was paid to French demands. France finally made a peremptory demand for an indemnity of 600,000 francs,[96] but this was refused and accordingly diplomatic relations were severed and Mexican ports declared to be under blockade. This procedure did not bring Mexico to terms. Reinforcements were sent and, following an unsuccessful conference, Vera Cruz was bombarded and abandoned by the inhabitants. At this point Great Britain offered to mediate, and the two contendants agreeing, a new conference was held. France did not, however, follow up her advantage but accepted practically the same conditions which had been previously offered her by the Mexican Government.[97]

During the course of the dispute, an interesting doctrine was aired by the Mexicans. They declared that [98] "We are a nation always agitated by revolutions; as such we suffer all the consequences of a state of revolution, popular tumult, robberies, plunderings, assassinations, unjust decrees, and since we are obliged to suffer all these evils, we consider that the foreigners who may be in our country must suffer like ourselves, without a chance of redress or compensation." However anarchistic this confession of faith may appear, it is not an isolated expression of opinion. It stands as the most candid and concise statement of the principle which the Latin American states are forever reiterating.

In the year 1856 an important case known as the "Panama Riot Case" arose between the United States and the Republic of New Granada.[99] The outbreak arose as the result of a quarrel between a railroad passenger and a negro vender. The negro's companion shot among the passengers, a mob collected and attacked the travellers and they were even joined by the police. The mob was dispersed only after many passengers had been killed.

The case was finally decided by arbitration, which was provided for in a convention signed September 10, 1867, in which the Government

[96] 27 Br. & For. St. Pap., p. 1178; H. H. Bancroft, Works, Vol. 13, p. 187.
[97] 27 Br. & For. St. Pap., p. 1186 ff.
[98] *Ibid.*, p. 1176.
[99] Moore, History and Digest of International Arbitrations, Vol. II, p. 1362.

of New Granada acknowledged "its liability arising out of its privileges and obligations to preserve peace and good order along the transit route." [100] The case was not settled, as is generally supposed,[101] on the basis solely of the treaty stipulation. General Herran, the envoy of New Granada, pointed out that this was an extraordinary liability of his government based not alone on treaty stipulation between the countries but on a principle of international law as well.[102]

It is interesting to note that in the next dispute over the rights of foreigners, Mexico was again involved. This was the celebrated triple intervention of the years 1861–2. The facts of the case are familiar. British claims were based not only upon demands of indemnity for injuries sustained by some of her citizens during long series of disorders, but also included important claims for funded debt and a large sum of money stolen from the legation.[103] Spanish claims were based mainly upon recognition of claims by a previous convention, whereas French intervention was solely to recover for bonded indebtedness of Mexico.[104] The existing government refused to recognize the acts of its predecessors and, after protracted diplomatic wrangling, relations were severed and a joint intervention was decided upon. A convention was signed October 31, 1861 by the three Powers in question and to this the United States was invited to give adherence. Mr. Seward declined,[105] but indicated that the United States would not interfere as long as the provisions of the convention were observed.

In the latter months of the year 1861 the squadrons of the three Powers sailed to Vera Cruz and seized that port, but before any further definite operations were entered upon both the English and Spanish forces withdrew.[106] The intention of the French had become apparent, and the other governments refused to identify themselves with this policy. A treaty was made between Great Britain and Mexico but was

[100] Malloy, Treaties, etc., of U. S., Vol. I, p. 302.
[101] So Mr. Arias in this JOURNAL for October, 1913.
[102] Moore, Arbitrations, Vol. II, p. 1369.
[103] 52 Br. & For. St. Pap., pp. 272–87.
[104] *Ibid.*, 392.
[105] 51 Br. & For. St. Pap., p. 63.
[106] House Doc., 100, 37 Cong. 2 sess., p. 1187.

not ratified.[107] A convention of 1866 finally settled the question in favor of Great Britain.[108]

Such, in brief, are the outlines of the intervention in Mexico as far as it affected the problem with which we are concerned. The French claims were not for injuries to aliens, so we shall not discuss the period of French dominance in that country. It may be said, however, that although these claims of responsibility differed in kind and had perhaps a more forceful legal sanction than those which we are considering, yet at bottom many of the same principles are involved, and from this point of view the French intervention may be said to have had some effect upon the law of responsibility. At the same time we must remember that a great many other elements, especially political ones, were also involved in this dispute which in turn rob the incident of some of its international significance.

Another point which we may well consider at this point is the question of the influence of the Monroe Doctrine upon the attitude of the Latin American states. I know that there has been a general feeling that much of the indifference and even defiance of these states is based upon the idea that the Monroe Doctrine will afford them protection. Whatever are the virtues or defects of this doctrine, it is certainly true that on no occasion has the United States invoked it to protect the turbulent southern republics from being coerced into paying their debts. It is really inconceivable that the Latin American states could hope for a protection which has never been offered them. Of course, there may be some mystic moral force to the doctrine which has led European states to keep hands off when otherwise they would have intervened. But if this is so it has been incommensurable.

There is a single case recorded in which we have the interesting situation of a Latin American state claiming the responsibility of a great Power. This is the case of *Alleghanian*, an American ship loaded with guano belonging to the Peruvian Government. The ship was burned by Confederate forces in Chesapeake Bay. In a note of January 9, 1863, Mr. Seward rejected the claim on the ground that it was an act of treason and piracy which the United States had been unable to suppress al-

[107] 53 Br. & For. St. Pap., p. 573.
[108] 56 *Ibid.*, p. 7.

though it had been extraordinarily vigilant. There was no fault on the part of the United States. The claim was later brought before a joint claims commission but was rejected on the ground that it was a government claim and not that of a private citizen.[109]

The same commission which settled the *Alleghanian* claim also decided a number of claims in favor of the United States, against Peru, for injuries to its citizens in various revolutions. Again in 1871 [110] another settlement was made by the Peruvian Government for damages caused by the sacking of Callao in 1865 by the Pradist insurrectos. Two United States citizens were indemnified by this decree.[111]

In this same year the United States was also pressing a claim against Colombia for the seizure of the steamer *Montijo*, an American vessel, by a party of revolutionists in the State of Panama.[112] The Colombian Government denied its responsibility for losses to aliens through "common crimes." It prosecuted the offenders, but ineffectually. Finally, arbitration was resorted to in 1874 and the case was decided for the United States.

Two points of interest were raised in this dispute. First of all the Colombian Government asserted that it would not be held responsible for debts of the State of Panama because they were in this case private debts. The umpire refused to agree with this. He insisted that the debts were those of the federal government, not only because a violation of treaty privileges was involved, but also because they were clearly public in character. In a federal system, he said, constituent states were non-existent so far as foreign relations were concerned. The second point involved the fixing of liability. The officers of the Union had failed in their treaty and international law obligation to protect United States citizens. Clearly it was the duty of the President of Panama as agent of the government to recover the *Montijo*. "It is true," he said, "that they did not have the means of doing so. * * * but this absence of power does not remove the obligation. The first duty of every government is to make itself respected both at home and abroad.

[109] For facts *cf.* Moore, Arb., Vol. II, p. 1615 *et seq.*
[110] Moore, Arb., Vol. II, pp. 1629, 1652–7.
[111] VI Moore, Digest, p. 973.
[112] Moore, Arb., Vol. II, p. 1421; For. Rel. 1871, p. 230.

If it promises protection to whom it consents to admit into its territory it must find the means of making it effective. If it does not do so, even if by no fault of its own, it must make the amends in its power, *viz.*, compensate the sufferer."

Another case based on very similar facts was that of the Venezuelan Transportation Company.[113] This was an American corporation operating in Venezuela. Steamers of the company were seized during the course of an insurrection and serious losses incurred. The diplomatic correspondence in this case dragged on for some twenty years, and at one time war seemed imminent. In June, 1890, the President of the United States was empowered by joint resolution of Congress to take such measures as were necessary. Fortunately these measures were the entering into arbitration in favor of the United States. It may be noted that the Venezuelan Government strenuously combatted the claims of the United States, alleging that they were contrary to the principles of responsibility which the United States herself was at that time avowing.

In 1885 the United States and several other countries had occasion to claim the responsibility of Colombia.[114] We have seen that this state attempted to regulate the matter by decree. This was unsuccessful, and although almost thirty years have since passed no results have been reached.

We turn next to a series of important revolutions, beginning with the year 1891, which gave considerable impetus to the growth of international responsibility. In Chile a usurping president was deposed by the party supporting the Congress, but not without some rioting and bloodshed.[115] On August 8, 1892, the United States concluded a convention with Chile whereby claims were submitted to an arbitral tribunal. The claims were decided in favor of the United States. So, too, with the claims of England, France, Norway-Sweden and Italy. German claims were settled through diplomatic channels. The conclusion of these conventions would indicate that the Chilean Government did not refuse to regard itself as responsible and this was

[113] Moore, Arb., Vol. II, p. 1693 *et seq.*
[114] Sen. Doc. 264, 57th Cong. 1 sess.; 76 Br. & For. St. Pap., p. 566.
[115] Moore, Arb., Vol. II, p. 2117 *R. D. I. P.* XIX, p. 268.

in fact very clearly shown by the correspondence with the United States.[116]

A serious dispute arose between Venezuela and certain European Powers as a result of claims of responsibility following the civil war of 1892. The Venezuelan Government had established a special claims commission for payment of all requisitions of the *de jure* government. All claims were cognizable only by the high federal court, a plan which left to the Venezuelans the final determination of the same. A proposal to form an international commission was repudiated with such vigor that the diplomatic corps decided to bring pressure to bear, and to this end drew up a memorandum to which most of the interested parties became signatories. A change in the personnel of the corps overthrew these plans, and the *entente* was never formed. Italy, which opposed the plan, managed to effect a settlement on a basis of from five to thirty per cent.[117] The French claims were settled by a convention in 1902.[118] It is important to note that despite the settlement which was made with Italy, the Italian Government expressed itself very firmly as opposed to diplomatic intervention in affairs of this sort.

The following year occurred the revolution in Brazil which overthrew the empire.[119] The Brazilian Congress instituted a court of claims to take cognizance of claims of aliens, denying, at the same time, the right to resort to diplomatic intervention to effect these ends. Nevertheless, France, Spain, Germany, Austria-Hungary, Russia, Belgium and Denmark all secured recognition of their rights through regular diplomatic channels.

The claims of Italy were the most numerous of all. But, unfortunately for her cause, the Green Book, recently issued, in which she had so thoroughly disapproved of the use of diplomatic intervention, was seized upon by the Brazilian Government and used as ammunition against its author. The claims of Italy were presented on March 11, 1885, to the Brazilian Government, but the latter repudiated respon-

[116] For. Rel. 1892, p. 54.

[117] II *R. D. I. P.*, p. 45.

[118] Sen. Doc. 533, 59th Cong. 1st Sess. The Italian Government published compromising papers in a Green Book which led to recall of Venezuelan ministers in France and Belgium. France retaliated in kind.

[119] 4 *R. D. I. P.*, p. 403.

sibility for injuries resulting from acts of insurrectos, and, furthermore, what it was pleased to call *vis major*. A counter-proposition of the Brazilian Government was rejected, but after negotiation, the Italian and Brazilian ministers signed two protocols, one by which a mixed local commission was to settle certain claims; the other protocol submitted certain questions to arbitration by the President of the United States.

The protocols were submitted to the Brazilian Congress and while still in the stage of debate popular excitement broke forth in riotous anti-Italian manifestations and in the São Paolo some 65 persons were killed and wounded. The Italian Government, very much excited over these events, dispatched a flying squadron to Brazil and all emigration was forbidden. Despite these warlike manifestations, however, the whole matter was settled peacefully and the sum of 4,900,000 francs was granted in settlement of claims not otherwise regulated.

During the same civil war three French citizens were killed, and reparation was demanded by the French Government. Brazil replied with the much quoted note of October 9, 1893,[120] denying all liability but two years later 900,000 francs were paid the French Government by way of indemnity.

These cases, occurring in the years most fruitful of mob outbreaks, although they present many points of difference, notably in the acknowledgment of the right of diplomatic intervention, in result they have been the same. The indemnity has been paid and another acknowledgment of liability effected. We now turn to the celebrated Venezuelan intervention of 1902.

Most of the important European states had claims of responsibility against Venezuela, but those of Great Britain, Germany and Italy were the most numerous. The British claims included demands of reparation for the seizure of certain vessels as well as for injuries to its citizens in the recent uprisings. The Italian and German claims were similar in nature and included certain contract claims. The conflict was inaugurated by the presentation of a promemoria by the German Ambassador to the United States in which it was proposed to present an ultimatum and then resort to a blockade of Venezuelan ports.[121] It was not until

[120] *Archives Diplomatiques*, Vol. 48, ser. 2, p. 215.
[121] For. Rel. 1901, p. 193.

a year later that these proposals were carried into effect. Great Britain and Italy joined with Germany in the presentation of an ultimatum, December 7, 1902, and the following day diplomatic relations were severed. The events which followed are familiar. The Venezuelan gunboats were seized and a blockade of the Venezuelan coast was entered into, with the result that President Castro finally capitulated and in a note sent by the American Minister to the State Department, December 31, 1902, declared that he recognized in principle the claims of the allied Powers.[122] His proposal to arbitrate was accepted with certain reservations, and by February 16, 1903 the blockade was raised. Mixed commissions settled all questions but that of preferential payment, which was submitted to The Hague.[123]

Since the Venezuelan case, we have had two minor cases arising, that of Deebs against Colombia, which resulted in payment of indemnity for injuries sustained by him in a revolution, and again the final decision against Colombia in the Cerutti affair.[124] Doubtlessly, the recent Nicaraguan, Venezuelan and Mexican imbroglios will give rise to important claims of responsibility.

It remains for us to review the Latin American situation. On the whole, despite the monotonous reiteration of opinions of non-responsibility, the development has been steadily toward increasing liability. Statutory and constitutional provisions have alike proven unavailing to stem the tide of international progress and opinion, and the unusual number of cases resulting in an assumption of liability have furnished the law with tremendous precedent. It is difficult to prophesy what will be the future development in Latin America. It is not impossible that the increasing tendency to arbitrate will bring an adjustment of many former difficulties. Certainly, in view of the present attitude of the Powers, this method presents itself as the most satisfactory solution of an embarrassing situation. But whatever course the Latin American states may in the future pursue, they can hardly continue to repudiate the theory of responsibility, which is now an integral part of international law, without reflecting on their international prestige.

[122] For. Rel. 1903, p. 803. [123] *Ibid.*, p. 823.

[124] The question of responsibility was not important in this case.

V

In conclusion, I should like to say something about the development of the law of international responsibility in the practice of China and of the United States. My study of the cases involving these states is, unfortunately, not yet completed, but I may be able to indicate some of the general tendencies.

In China, outrages against aliens have been confined largely to mob violence based on a deep-seated anti-foreign sentiment. This feeling expressed itself originally in various forms of government oppression, especially during the eighteenth century, when the spoliations of Anglo-Saxon adventurers brought a reversal of the early pro-foreign policy of the government. The hostility of the ruling classes communicated itself to the populace, and mob outbreaks against foreigners began to occur with some regularity in the latter twenties of the nineteenth century, when European operations in China were still confined to the activities of the great mercantile companies. The growth of commercial relations with China seems rather to have enhanced than to have diminished the prejudices against aliens. And events like the Opium War of 1840, and again the campaigns which culminated in the treaties of Tientsin, cannot have increased the liking of the Chinese people for the alien intruders. Up to the time of the last mentioned treaties, the outbreaks were sporadic and acknowledgments of responsibility were invariable. The Chinese authorities, however, insisted that rules of international law were not for them. On the other hand, the European states were equally certain that only thus were the relations between Orient and Occident to be amicably adjusted. This was, of course, an unwarranted assumption, and the international law which was administered was much at variance with the principles which governed the relations among European states.

After the treaties of Tientsin the Europeanization of China proceeded more rapidly, but at the same time the anti-foreign sentiment, under the tutelage of secret political clubs, grew more aggressive, and, beginning with the fearful Tientsin massacre of 1870, we have a long series of almost annual outrages which culminated finally in the European intervention in the Boxer troubles. Next to the Venezuelan affair of

1903, there has been a no more pronounced and spectacular vindication of the international responsibility of states. Since 1900, however, there have been further instances of outrages upon aliens and it does not appear that any change is imminent.

I have already remarked upon the peculiar character of the international law which was administered in China in the early nineteenth century. This was due not only to the singular policy of aloofness insisted upon by the imperial government, but also to the fact that extended extraterritorial jurisdiction was exercised in China by all the important Powers. After the year 1858, these influences became of less importance, at least as regards the present problem, and the law of responsibility appears to have followed the same line of development as in other parts of the world. Indeed, the Chinese Government appears to have expressly recognized these principles when, on various occasions, it had reason to demand the responsibility of the United States for injuries sustained by its subjects, the result of mob outbreaks. We may, therefore, say that in general the principle of responsibility is firmly established in the international law which has developed from Chinese precedents.

We have already had occasion to observe in some detail the practice of the United States. Two facts stand out with some prominence; the United States has always been ready to press claims for injuries to its own citizens abroad, and has been uniformly successful in obtaining acknowledgments of liability; on the other hand, this same government has invariably repudiated the principle of responsibility when similar claims have been made upon it and in most instances an indemnity has been granted.

This same tendency we have noted elsewhere but in no state has it been so conspicuous as in our own country. This is due, perhaps, to the traditional belief that responsibility must first be denied before an indemnity may be paid. Most of the indemnities paid by the United States have been paid in this fashion and have been carefully classified as expressions of spontaneous liberality. Thus, the Spanish claims in 1850, the Italian lynching cases and the Chinese cases were all of this sort.

There is little excuse for the inconsistencies practiced by the United States. We have seen that indemnities once paid have invariably had

the effect of an expression of responsibility, no matter how they may have been limited or designated. This has also been the case in this country, and many of the cases which were settled on the spontaneous liberality principle have since been cited in support of the principle of absolute liability. The continuance of the policy of the United States does not reflect a great deal of credit on the statesmen who insist upon it and its only effect is to obscure the real international law.

JULIUS GOEBEL, JR.

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EDITORIAL COMMENT

THE WAR IN EUROPE

The great European conflagration which has been predicted for a number of years, and as to the causes, results and conduct of which volumes have been written, has at last come upon the world with amazing rapidity, when it was apparently least expected, and with inexpressible fury. Within less than two weeks from the time when it was first known that a possible *casus belli* existed between Austria and Servia, growing out of or induced by the assassination of the Archduke Francis Ferdinand and his wife at Serajevo on June 28th last, not only were those two nations involved in armed conflict but they had brought into the maelstrom of war four other great Powers and two lesser ones. Within a few more days a fifth Power had indicated its purpose to take

part in this great tragedy of modern times and the "*dramatis personæ*" may not yet be complete. Arrayed against the Dual Alliance, composed of the Teutonic empires of Germany and Austria, are the members of the powerful Triple Entente, Russia, France, and Great Britain with her powerful colonial dominions and her Far Eastern ally, Japan, and the small kingdoms of Servia and Montenegro. Fighting side by side with them are the Belgians, brought unwillingly and involuntarily into the conflict. The Triple Alliance has probably passed into history, for the Italian Government has declared its neutrality and is reported to have taken the position that it is not bound by the alliance to take part in the war because it is one of aggression and not of defense.

What is the cause of the war, and why are the various nations involved? For the real reasons we must no doubt look to the underlying rivalries and jealousies of the peoples affected, and to the clash of their racial ambitions and national interests. On paper, Austria-Hungary, believing that the integrity of their empire was threatened by Servian ambitions and propaganda, delivered, on July 23, 1914, an ultimatum to Servia the conditions of which it could not reasonably be expected would be unconditionally complied with. Upon the failure of Servia to comply unconditionally within the time-limit set in the ultimatum, Austria declared war on July 28, 1914. Russia declined to stand by and quietly allow a further increase of Austrian influence in the Slav countries by a repetition of the events of 1908 when Bosnia and Herzegovina were annexed, or by the reduction of Servia to a state of vassalage, and took steps which unmistakably indicated its purpose of forcibly intervening to protect Servia. Germany, pressed diplomatically by the other great Powers of Europe to stay the precipitate action of her ally, assumed the attitude that the dispute between Austria and Servia was a matter solely for those two countries to settle between themselves, that no other nation, therefore, had a right to interfere, and that she was ready to back her ally in the proposed punitive measures against Servia. She regarded the mobilization of the Russian army, which was begun when the relations between Austria and Servia became threatening, as a menace not only to Austria but to the safety of her own empire, and demanded that the mobilization be discontinued. This demand was ignored by Russia and Germany declared war on August 1, 1914. A simultaneous demand was made upon France, Russia's ally, for a declaration of neutrality in the war with Russia. Upon the failure of France to give such an assurance, diplomatic relations were severed and

France was attacked at several points, including an invasion by the German army through Belgium and Luxemburg. Great Britain, as a party to the treaty guaranteeing the neutrality of Belgium, demanded that Germany respect the guarantees of that treaty, to which she was also a party. Germany declined to comply with this demand and Great Britain on August 4th declared war. Later Japan, the ally of Great Britain in the Far East, demanded that Germany relinquish her possessions there and remove her fleets from Far Eastern waters. Upon the failure of Germany to comply with this demand, Japan, on August 23rd, declared war. In order that there might be no technical hitch in the conduct of the war operations, the different belligerents who had not declared war upon all the belligerents on the other side, took occasion at opportune times formally and officially to do so.

Since its outbreak the war has been pushed with unsurpassed vigor and determination on both sides. The numbers of men and the power and equipment of the armies reported to be engaged seem beyond ordinary comprehension. The details from the battle fields which are allowed to leak through the strict censorship do not seem actually to fall short of the awful carnage and destruction, horrors and suffering described by writers of fiction within the last few years in their predictions of a great catastrophic struggle, which enlightened people everywhere hoped would remain a figment of the imagination. Humanity seems at last to have been dealt a staggering blow in a vital place.

Upon whom rests the grave responsibility for the outbreak of the war and its inevitable results? It is not for the JOURNAL to attempt to say. We refer our readers without comment to the official communications which preceded the opening of hostilities, published by Great Britain and Germany and reprinted in the SUPPLEMENT to this issue. In them will be found the official views as to the causes of the war and the reasons for and the facts upon which those views are based. Each reader may peruse them and draw his own conclusion.

Regardless of the reasons or responsibility for the war, it has already raised questions of the gravest concern to those interested in the maintenance and progressive development of sound principles and practices of international law. Other questions, important, but of less concern, some of them to be decided for the first time, have also come up for solution. It is the purpose of the JOURNAL, to supply its readers from time to time with articles or editorial comments by competent writers on the different questions raised by or growing out of the war.

The attitude of the United States Government is one of strict and impartial neutrality. Proclamations of neutrality between the various belligerents were promptly issued by President Wilson. In addition, he has let it be known that the Federal Government would look with disfavor upon loans made by Americans to any of the warring nations which might enable them to carry on or prolong the hostilities. He has also issued a statement to the American people asking them individually to remain neutral in words as well as in actions. This statement, which is printed below, besides being published in the daily press throughout the country, has been posted in 60,000 post offices in the United States, in the English, German, Italian, Polish and French languages:

MY FELLOW COUNTRYMEN:

I suppose that every thoughtful man in America has asked himself, during these last troubled weeks, what influence the European war may exert upon the United States, and I take the liberty of addressing a few words to you in order to point out that it is entirely within our own choice what its effects upon us will be and to urge very earnestly upon you the sort of speech and conduct which will best safeguard the nation against distress and disaster.

The effect of the war upon the United States will depend upon what American citizens say and do. Every man who really loves America will act and speak in the true spirit of neutrality, which is the spirit of impartiality and fairness and friendliness to all concerned. The spirit of the nation in this critical matter will be determined largely by what individuals and society and those gathered in public meetings do and say, upon what newspapers and magazines contain, upon what ministers utter in their pulpits, and men proclaim as their opinions on the street.

The people of the United States are drawn from many nations, and chiefly from the nations now at war. It is natural and inevitable that there should be the utmost variety of sympathy and desire among them with regard to the issues and circumstances of the conflict. Some will wish one nation, others another, to succeed in the momentous struggle. It will be easy to excite passion and difficult to allay it. Those responsible for exciting it will assume a heavy responsibility, responsibility for no less a thing than that the people of the United States, whose love of their country and whose loyalty to its government should unite them as Americans all, bound in honor and affection to think first of her and her interests, may be divided in camps of hostile opinion, hot against each other, involved in the war itself in impulse and opinion if not in action.

Such divisions among us would be fatal to our peace of mind and might seriously stand in the way of the proper performance of our duty as the one great nation at peace, the one people holding itself ready to play a part of impartial mediation and speak the counsels of peace and accommodation, not as a partisan, but as a friend.

I venture, therefore, my fellow countrymen, to speak a solemn word of warning to you against that deepest, most subtle, most essential breach of neutrality which may spring out of partisanship, out of passionately taking sides. The United States

must be neutral in fact as well as in name during these days that are to try men's souls. We must be impartial in thought as well as in action, must put a curb upon our sentiments as well as upon every transaction that might be construed as a preference of one party to the struggle before another.

My thought is of America. I am speaking, I feel sure, the earnest wish and purpose of every thoughtful American that this great country of ours, which is, of course, the first in our thoughts and in our hearts, should show herself in this time of peculiar trial a nation fit beyond others to exhibit the fine poise of undisturbed judgment, the dignity of self-control, the efficiency of dispassionate action; a nation that neither sits in judgment upon others nor is disturbed in her own counsels and which keeps herself fit and free to do what is honest and disinterested and truly serviceable for the peace of the world.

Shall we not resolve to put upon ourselves the restraints which will bring to our people the happiness and the great and lasting influence for peace we covet for them?

If the accounts from the scene of conflict, of violations of the rules of international law, of brutalities committed in contempt of the laws of civilized warfare, and of atrocities perpetrated in disregard of the rights of humanity seem to make it difficult to conform to the President's admonition, let us bear in mind his reply to the protest of the German Kaiser:

I received your Imperial Majesty's important communication of the 7th and have read it with the gravest interest and concern. I am honored that you should have turned to me for an impartial judgment as the representative of a people truly disinterested as respects the present war and truly desirous of knowing and accepting the truth.

You will, I am sure, not expect me to say more. Presently, I pray God very soon, this war will be over. The day of accounting will then come when I take it for granted the nations of Europe will assemble to determine a settlement. Where wrongs have been committed, their consequences and the relative responsibility involved will be assessed.

The nations of the world have fortunately by agreement made a plan for such a reckoning and settlement. What such a plan cannot compass the opinion of mankind, the final arbiter in all such matters, will supply. It would be unwise, it would be premature, for a single government, however fortunately separated from the present struggle, it would even be inconsistent with the neutral position of any nation which like this has no part in the contest, to form or express a final judgment.

I speak thus frankly because I know that you will expect and wish me to do so as one friend speaks to another, and because I feel sure that such a reservation of judgment until the end of the war, when all its events and circumstances can be seen in their entirety and in their true relations, will commend itself to you as a true expression of sincere neutrality.

AN INTERNATIONAL SERVITUDE

The Supreme Court of Cologne (Oberlandesgericht) rendered, on April 21, 1914, a very important judgment against the Aix-la-Chapelle-Maastricht Railroad Company, in which the Dutch Government intervened on behalf of its lessee.[1] The plaintiff in this case owns, it appears, a number of houses situated at Naustrass near Herzogenrath, and alleged that they had been damaged and depreciated in value by reason of the *dominial* or governmental mine worked by the lessee of the Netherland Government. Leaving out details, the important point before the court, and which it squarely decided, was whether the lessee, operating a mine within Prussian territory, was subject to the mining law of Prussia in the assessment of damages, or whether, admitting the injury to have taken place, the law of the Netherlands was to be applied. In an ordinary suit this question could not have been argued, as in matters of real estate the local law is universally held to be applicable. The circumstances, however, were peculiar, and by reason of this peculiarity and the legal status created, the case is one of more than passing interest.

It appears that a boundary treaty between Prussia and the Netherlands was concluded on June 26, 1816, and that certain districts, including the one in which the mine in question was located, were ceded to Prussia. It was provided, however, in Article 19 of this treaty that "the cession of the districts * * * shall cause no damage or disadvantage to the exploitation of the coal mine", and that the Dutch Government, "or in its place the lawful owner, retains the authority to carry on in the ceded parts works serviceable for the mining of coal or for drainage purposes. Neither under the pretext of instructions issued to its engineers, nor by imposts or other burdens, may the Government of Prussia interfere with or restrict the mining of coal or the bringing of the coal mined to the surface; nor may it place any hindrance in the way of its being marketed."

The question involved was whether the interest which the Dutch Government had in the mine was to be considered as a mere concession, in which case it would be subject to Prussian law, or whether it was to be regarded as an international servitude, in which case it was contended that it would not be subject to the Prussian law. According to the first

[1] Decision printed in Judicial Decisions, page 907.

view, the mining right would be a creature of private law and as such controlled by its provisions. According to the second view, the mining right would be a creature of international law and controlled by its provisions. The court adopted the latter view, as appears from the following judgment:

> The opinion of the judge of the lower court, to the effect that the aforesaid authority of the Dutch Government must be regarded as a mining concession, transferred to the defendant, does not meet the present case. The plea entered by the intervener that, in conformity with all the circumstances, the boundary treaty between Prussia and the Netherlands is in the nature of an agreement coming within the sphere of international law, by which the territorial sovereignty of the two neighboring states was mutually defined, must be accepted. Parts of the districts of Kerkrade and Rolduc go to Prussia, but the Dutch Government *retains* the *right* to carry on mining in the ceded parts. This means, as the intervener correctly states, not what might be termed a mining concession of the Dutch Government granted by Prussia according to civil law, but the exclusion of certain sovereign rights in the ceded parts resulting from the territorial sovereignty. In so far as the right to mine coal and other minerals contained in this coal-field comes into question, part of this territorial sovereignty remains with Holland. Because of this fact, a sort of international servitude has arisen by which Holland is, as a state, entitled, now as previously, in the matter of this mine, to exercise its own legislative authority and police supervision; that is, it has real sovereign rights with respect to the object situated within the territory of the foreign state. (See Ulmann, *Völkerrecht*, pp. 320 ff.)

It would seem that this judgment is an express recognition of an international servitude, and that an essential element of such a legal status is that the country, on whose behalf it is created, exercises its right as a sovereign, and that for the purpose of the exercise of the right, it is withdrawn from the sovereignty of the grantor.

In the recent North Atlantic Fisheries arbitration, decided at The Hague in 1910, the tribunal used language calculated to throw doubt upon the existence of international servitudes, explaining that the doctrine "originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire, of which the *domini terrae* were not fully sovereigns"; that "the modern state * * * has never admitted partition of sovereignty, owing to the constitution of the modern state requiring essentially sovereignty and independence"; that the doctrine was "but little suited to the principle of sovereignty which prevails in states under a system of constitutional government * * * and to the present international relation of sovereign states, has found little, if any, support from modern publicists. It (the international servitude) could therefore, in the general interest of the community and of the

parties to this treaty, be affirmed by this tribunal only on the express evidence of an international contract."

It cannot be said that Prussia and the Netherlands at the time of the treaty of 1816 between them "were not fully sovereigns," and it cannot be maintained with any show of reason that Prussia or Holland is not a modern state. It may be that a servitude is "little suited to the principle of sovereignty," but this is a matter for the nations themselves to determine. The statement of the tribunal that the doctrine "has found little, if any, support from modern publicists" flies in the teeth of most modern publicists, who overwhelmingly support the doctrine. It is difficult to ascertain just what the tribunal meant by saying that it could affirm the doctrine "only on the express evidence of an international contract," unless it means that the term servitude should be used in the treaty creating this status. The contract between Prussia and Holland of 1816 did not use the term servitude, although the Oberlandesgericht held that it created a status aptly termed an international servitude, which it could not have done if it were impressed by the arbitral award of the fisheries tribunal.

It is not the purpose of this comment to thresh over the fisheries dispute. It merely calls attention to the fact that a modern state, with a constitutional form of government, recognized the doctrine of servitude against its own interest in the interpretation of a treaty in which the term servitude was not mentioned, and declared squarely that the right created was a sovereign right in favor of the grantee and, as such, withdrawn from the sovereignty of the grantor. For this reason the case is not merely of interest to the parties in litigation, but to students of international law in all parts of the world.

MEXICO

Previous comments in these columns have informed our readers from time to time of the course of events in the revolution which has been in progress in Mexico for several years. The comment in our last number narrated the events leading up to the mediation of Argentina, Brazil and Chile, growing out of the Tampico flag incident and the occupation of Vera Cruz by the American forces. The result of the mediation, namely, the conclusion of a protocol between the United States and General Huerta, which adjusted the differences between them and left the organization of a provisional government which would be recognized

by the United States, to be agreed upon by the contending Mexican factions, was also stated. Since then, events in Mexico have moved rapidly toward a peaceful termination of the civil war.

Immediately upon the conclusion of the agreement between the United States and General Huerta, it appears that the mediators invited General Venustiano Carranza, the First Chief of the Constitutionalists, to send delegates to meet representatives of General Huerta, to discuss and agree upon the organization of a provisional government which could bring about the pacification of the country and re-establish normal conditions. General Carranza replied that it would be necessary for him to consult his generals in the field before acting upon the request. He stated that this was necessary because the revolutionary plan, known as the "plan of Guadaloupe," proposes "to restore the constitutional order by means of a provisional president and that the plan would be modified if such government were made to emanate from a possible agreement with the delegates of General Huerta."

The Constitutionalist generals apparently were unwilling to meet the representatives of General Huerta in conference on the subject of a provisional government, but continued the successful advance of their armies toward Mexico City. On July 5th a presidential election, in which it is reported that very few voters took part, was held in Mexico City, and General Huerta was re-elected, but in spite of this apparent vote of confidence, ten days later, July 15th, he presented his resignation to the Chamber of Deputies, and on July 20th he, with members of his family, sailed from Puerto Mexico, on board the German cruiser *Dresden*.

Immediately upon its receipt, the Chamber of Deputies accepted General Huerta's resignation, and Francisco Carbajal, formerly Chief Justice of the Supreme Court of Mexico, and recently appointed Minister for Foreign Affairs, took the oath of office as provisional president.

The new provisional president at once appointed delegates to meet General Carranza and arrange for the transfer of the government at Mexico City to the Constitutionalists. The delegates met at Saltillo, but after several days of fruitless negotiations, it was announced on August 3rd that an agreement could not be reached, and the conference was abandoned. It was reported that provisional president Carbajal instructed his representatives to insist upon the following conditions:

1. An armistice and the issue of instructions to the chiefs of the contending parties for the immediate cessation of hostilities.

2. The transmission of the executive power by a dissolution of the present Congress, and the restoration of the Congress dissolved by Huerta.

3. The issue by the reinstated Congress of a general armistice so that nobody should be molested for his political opinions or his part in military operations.

4. The recognition of the military grades obtained by Federal officers.

5. The resignation of Carbajal as President after the reinstated Congress had assembled, either to that body or through manifesto to the people, and the designation by Congress of the person to receive the executive power according to the custom before the year 1898.

6. Arrangements relative to financial questions, especially affecting the interests of foreigners.

It was also reported that General Carranza declined to view the proceedings at Saltillo as a conference for the negotiation of the terms upon which Mexico City would be surrendered, as he took the position that the Constitutionalists, being victors in the war, were entitled to the unconditional surrender of the city and government, and that it was necessary only to arrange the formalities of the transfer of authority from the Carbajal regime to the Constitutionalists. He is reported as having been particularly opposed to granting a general amnesty, which might include the persons criminally responsible for the assassination of former President Madero and Vice-President Suarez.

On the night of August 12th, the provisional president and his Cabinet fled from Mexico City and at the same time the city was evacuated by the Federal Army. President Carbajal left a manifesto to the people stating that inasmuch as his overtures were met by the uncompromising demands of the Constitutionalists for unconditional surrender, only two courses were open to him,—fight or flight, and that his government accordingly could not stand. The duty and responsibility of preserving order in Mexico City pending its occupation by the Constitutionalists devolved upon General Iturbide, Governor of the Federal District. On the following day Governor Iturbide visited General Carranza and arranged for his occupation of the city. The terms of the arrangement are reported to have been as follows:

First, the evacuating troops shall withdraw to towns on the railway between Mexico City and Puebla in groups not exceeding 5,000 men. They must not take artillery with them nor reserves of ammunition. When the troops are thus distributed they will be disarmed by representatives of the new government.

Second, the troops at Manzanillo, Cordoba, and Jalapa and in the States of Chiapas, Tabasco, Campeachy, and Yucatan shall be disarmed at their present stations.

Third, in proportion as the Federals withdraw the Constitutionalists shall occupy the positions evacuated by them.

Fourth, the Federal troops garrisoning the towns of San Angel, Tlalpam, Xochimilco, and other points fronting the Zapatista position, will be disarmed at those points when they are relieved by the Constitutionalist forces.

Fifth, the departing Federals shall not be molested by the Constitutionalists.

Sixth, military men unable to depart shall enjoy all guarantees.

Seventh, Gen. Obregon undertakes to furnish soldiers with means of returning to their homes.

Eighth, Generals and other officers shall hold themselves at the disposition of the First Chief of the Constitutionalists, who, on entering the capital, will be clothed with the character of the provisional President of the republic.

On August 15th the Constitutionalist Army, under General Obregon, entered the capital and on August 20th General Carranza made a triumphant entry into the city and assumed the reins of government.

Rumors of disagreement between factions of the victors, current even before General Carranza entered Mexico City, have since materialized into an open rupture between Generals Villa, Zapata and Carranza. Whether or not this is the beginning of another revolution in Mexico cannot be foretold at the present writing—October 15, 1914—as earnest efforts are being made to adjust the differences between the several leaders. On September 15 President Wilson ordered the withdrawal of the American troops from Vera Cruz. His explanation of this action was that it was taken "in view of the entire removal of the circumstances which were thought to justify the occupation. The further presence of the troops is deemed unnecessary." The carrying out of the order has apparently, however, been postponed until the danger of armed conflict between the Constitutionalist factions is passed.

Should the efforts now being made to avoid further bloodshed be successful, the turn which events have taken in Mexico cannot help but give great satisfaction to President Wilson, as they seem to vindicate completely his policy, which has been termed "watchful waiting." Whether or not the events which have taken place will turn out in the long run to be for the best interests of the people of Mexico remains to be seen. That these interests were in the mind of President Wilson when he refused to recognize Huerta because of the manner in which he came into power and when he adopted and pursued his peaceful policy is indicated by the following extract from his address delivered at the national celebration at Independence Square, Philadelphia, on the 4th of July last:

You know what a big question there is in Mexico. Eighty-five per cent of the Mexican people have never been allowed to have a look-in in regard to their government and the rights which have been exercised by the other fifteen per cent. Do you

suppose that circumstance is not sometimes in my thought? I know the American people have a heart that will beat just as strong for these millions in Mexico as it will beat for any other millions anywhere else in the world, and when they once know what is at stake in Mexico they will know what ought to be done in Mexico. You hear a great deal said about the property loss in Mexico, and I deplore it with all my heart. Upon the conclusion of the present disturbed condition in Mexico undoubtedly those who have lost properties ought to be compensated. Man's individual rights have met with many deplorable circumstances, but back of it all is a struggle of the people, and while we think of the one in the foreground let us not forget the other in the background.

THE PAPACY IN INTERNATIONAL LAW

Giuseppe Sarto, known as Pope Pius X, died at Rome on August 20, 1914. His successor, Giacomo della Chiesa, known as Benedict XV, was chosen at Rome on September 3, 1914. The death of Pius is said to have been hastened by the outbreak of war, which he tried to, but could not, prevent. Benedict is said to desire earnestly international peace and has, it is reported, made overtures to the Powers to end the war. Indeed, it is intimated that his election was due in no small measure to his attitude toward war.

It is not the function of a journal of international law to discourse at length upon the life and services of one whose kingdom is not of this world and whose influence is spiritual in the sense that it is not exercised through political channels. We must, however, admit the vast influence which the Pontiff has in the Catholic world and that, given the origin, history and international organization of the Papacy, it is the greatest single force for the world's good, if the Pope broaden his sympathies so as to embrace the world, instead of confining his activity solely to the Church of which he is the living head.

The late Pope was certainly not a politician, and it is doubtful if he could be considered a diplomat. He was deeply interested in the spiritual life of the Church, and his energy was primarily devoted to this phase of his work. He was, however, deeply and sincerely interested in peace, as is shown by the pontifical brief which he addressed in June, 1911, to Cardinal Falconio, then Apostolic Delegate to the Catholic Church in the United States. It is unnecessary to do more than to refer to this, as it was printed in the pages of the JOURNAL [Supplement (1911), Vol. 5, pp. 214–215] and was the subject of an editorial comment (Vol. 5, 1911, pp. 707–709). It is a source of regret to right-minded people, at least in the United States, that his influence failed when war and peace were in the balance. It is to be hoped that Benedict will be more

fortunate in his efforts to end a conflict which his generous and high-minded predecessor failed to prevent.

In the beginning of this comment the Pope's kingdom was declared to be spiritual, not temporal; and this statement is believed to be true, notwithstanding the fact that it is contrary to the claims of the Vatican and of churchmen in many parts of the world. There can be no doubt that the Pope was a temporal, as well as a spiritual, monarch before the annexation of the Papal States in 1870. Since then, it is believed that, while the Italian Government allows the Pontiff to live in the Vatican and accords to him the honors of a sovereign, he is not a sovereign in the sense in which that term is understood in international law. It is true that the Papal States were annexed by an act of force and that the Pope has not recognized the annexation. Conquest is, however, admitted in international law, and it matters little or nothing to the victor whether the victim accepts or questions the legality of the conquest, so long as he is powerless to change it. The Church does not recognize the legality of the action and reserves its rights in the premises; but it would seem that in international law the title of Italy to the Papal estates is clear, if conquest confers title, and that any rights or privileges which the Church exercises in the territory which it once possessed are in the nature of concessions from the present sovereign.

The position of the Pope according to international law has been passed upon from time to time by courts of justice, the most interesting of which is the series of decisions arising out of the beatification of Jeanne d'Arc in 1908. On July 4, 1909, certain persons displayed in their windows the pontifical flag. An ordinance of the Prefect of February 16, 1894, having the force of law, was issued in the following terms:

> Art. 1. It is forbidden in the Department of the Sarthe to display or to carry flags, either on the public highway or in buildings, sites and localities freely opened to the public.
>
> Art. 2. French or foreign flags and the emblems of authorized or approved societies are excepted from this prohibition.

Some eighteen persons displayed the papal colors in the city of Mans, were tried in the police court and were acquitted July 26, 1909, for the reason that the personal flag of a sovereign enjoys the same privilege as that of a state; that the Pope is a sovereign, and that display of the pontifical flag is permitted by Article 2 of the ordinance of February 16, 1894. On appeal to the Court of Cassation, the judgment of the inferior court of Mans was reversed on May 5, 1911, the court holding, in effect,

that "the pontifical flag is no longer a national foreign flag; that in fact the sovereignty of which it formerly was the symbol ceased to exist in consequence of the union of the Pontificate with the Kingdom of Italy; that the Pope does not represent a society in the sense of Article 2 of the above mentioned ordinance; that the flag can therefore not be considered as the emblem of an authorized or approved society."

In a later case the Criminal Court of Appeals of Sens delivered a judgment to the same effect, but set forth the reasons more in detail. The material portion is therefore quoted, as it appears to settle the question in so far as French courts are concerned:

Regarding the application of the decree of February 17, 1894, to the facts of the prevention:

Considering that strict interpretation is necessary in penal matters;

Considering that the decree of February 17, 1894, inhibits in a general way the display and bearing of flags; that no provision of this text aims especially, as asserted by the appellant, at the display of the red flag, nor that it indicates that it constitutes a transitory measure intended to terminate with the circumstances leading to its adoption;

Considering that the said decree does not except from the inhibition "French or foreign national flags, and those bearing the insignia of authorized or approved societies;"

Considering that the white and yellow flag, the national emblem of the former Pontifical States, cannot be included in this exception; that in fact these states have ceased to exist in consequence of their annexation to the Kingdom of Italy; that even admitting, contrarily to the principles of penal law, a liberal interpretation, placing the personal flag of a sovereign on the same plane with that of foreign countries, it would still be necessary, contrary to historic truth, to regard the white and yellow emblem as the personal flag of the Pope, and attribute to the latter the character of a sovereign;

Considering there is no doubt that since the disappearance of the Pontifical States in September, 1870, the Pope has lost the usual attributes of sovereignty, and that a Pontifical State no longer exists;

Considering that the Papacy does in fact no longer possess either territory, army or subjects; that it no longer possesses the right of civil jurisdiction, and that all matters pertaining to the civil status of the inhabitants of the Vatican are subject to the civil authorities of the Kingdom of Italy;

Considering that the law of guaranties has not conferred upon the Pope the sovereign right of international law, which alone confers upon those possessed of it the quality which this right confers upon real sovereigns;

Considering that by the terms of the decree of October 9, 1870, and of the law of guaranties of May 13, 1871, the Pope only has the usufruct of the pontifical residences, which, excepting certain restrictions relating to the "dignity, inviolability and personal prerogatives" of the Pope as head of the Catholic Church, remain subject to the Italian laws;

Considering that the law of guaranties does not even admit the extraterritoriality of the places occupied by the Pope;

Considering that if the internal legislation of the Italian State grants to the Pope certain personal privileges, which ordinarily form the appanages of sovereignty, such for instance as the right of active and passive legation which he exercises under very exceptional conditions, in view of the fact that his representatives are not real diplomatic agents, and that the Papal treaties (concordats) are not assimilable to the treaties between nations, it remains nevertheless true that from the international point of view the Pope must no longer be regarded as the head of a state;

Considering that under these conditions, the pontifical flag, in so far as it would be the symbol of a State, or the insignia of the head of a State, has ceased to exist, and that any element that might remove the said emblem from the interdiction formulated in the Prefectoral Decree, which alone might make either a national flag or the insignia of an authorized or recognized society, is totally lacking."

AN ANTECEDENT ALGECIRAS

When France, in 1901 and 1902, began actively to come to terms with Morocco regarding the Algero-Moroccan frontier, European observers of the moves in colonial politics realized with varying degrees of accuracy that another step in the cherished ambition of a consolidated French Africa was imminent. The Algerian frontier district was at that time occupied by tribesmen owning little allégiance to anyone and predisposed to trouble. Their comparative freedom from molestation had been due solely to the fact that they were actually living and raiding and fighting in a no-man's land, a territory belonging certainly neither to Algeria nor Morocco. A treaty of 1845 had defined a boundary which had been very imperfectly surveyed and had never existed for practical purposes. On July 20, 1901, a protocol was signed between France and Morocco looking to the policing and control of the frontier region and to the establishment of markets in it. It was supplemented by an agreement of April 20, 1902, and additional articles thereto of May 7, 1902. The three documents were ratified by Morocco seven months later, an important consideration in respect to the validity of any understanding with the Makhzen, or Moroccan government, which at that time was as elusive regarding obligations as it could be. The three treaties were not onerous; they made for obvious good order and development of commerce in the frontier region. Yet it was certain that they would have an important effect in extending French influence, for they provided that the finely-attuned French colonial instrument of the *bureau arabe* should enter the frontier region, and where it goes the people become French colonists through the sheer conviction of its ever-demonstrated efficiency.

Simultaneously France was beginning her series of understandings on Mediterranean territories, of which the best known is that with Great Britain of April 8, 1904. Italy was the first state with which an agreement was reached. Treaties relating to Tunisia, concluded on September 28, 1896, and a commercial arrangement of November 21, 1898, had served to improve relations between the two countries, and the French cabinet took up with the Italian ministers the proposition of an agreement that France would not be disposed to hinder Italian action in Tripoli if Rome would not hinder French action in Morocco. In December, 1900, some understanding was reached, but the known bipartite declaration was made in May, 1902, at the very time when France was making her Algero-Moroccan frontier situation certain.

On the coast of Morocco, opposite her own littoral, Spain owned for historic reasons the towns of Ceuta, Peñon de Velez de la Gomera, Alhucemas and Melilla, while just off the coast were the Zaffarine Islands. All were *presidios*, practically prison settlements, yet they gave Spain an undoubted right in northern Morocco. To the south on the Atlantic seaboard was the uncertain possession of Santa Cruz de Mar Pequeña, now identified and named Ifni. Below Morocco on the same coast lay Spanish Rio de Oro, resulting from the fact that Spain had, by royal decree of December 26, 1884, declared a protectorate over the Saharan littoral. On April 6, 1886, a royal order had incorporated the coast in the captaincy-general of the Canaries, the possession of which had first set Spain's eyes in the direction of the sub-Moroccan country. The Spanish declaration of protectorate in 1884 included the territory between Capes Bojador and Blanco, while the region northward to Cape Juby remained in doubt as to European ownership or control. At the very beginning of the present century Señor Leon y Castillo sought to reach an understanding whereby Spain was to be recognized as possessing the Saharan coast north from Cape Bojador. France replied that this question of the ownership of the Sequia el Hamra region affected Morocco and that consequently it could not be decided without the consent of England. There the question rested.

Spain was thus actively interested in Morocco at the very time France was negotiating with Italy and with Morocco. In fact, for a year or more, some agitation had been going on in Spain to have something done in Morocco. Señor Silvela had published in *La Lectura* in August, 1901, an article in which he had discussed the matter and which had

created much comment. That Spain and France should approach each other respecting the Shereefian empire was therefore a foregone conclusion.

In August, 1902, Spain and France did start the Moroccan question toward its international phase. At that time, Sagasta being premier and Leon y Castillo ambassador to Paris, a project of treaty was written by which Morocco was to be divided territorially between Spain and France, with the biggest slice appertaining to Madrid. Delcassé was at the Quai d'Orsay and the terms of the treaty project, which came to light only after the Agadir settlement was history, were as follows: [1]

Franco-Spanish Project of Treaty, 1902

The Government of the French Republic and the Government of his Majesty the King of Spain, happy in testifying to the cordial relations which exist between France and Spain and desiring to fortify them still more in the future, for the common good of the two countries, are agreed upon the following provisions:

Art. 1. France by the common possession of frontiers, Spain by the possession of the *presidios* and her various interests in relation with the territory of Morocco, have a preëminent interest in the maintenance of the territorial, political, economic, administrative, military and financial independence of Morocco.

They will not therefore conclude with any Power whatsoever any convention of any kind nor will they associate themselves, directly or indirectly, in any action which would have as its effect either the encouragement of establishing a foreign influence there or injury to the legitimate action and interests of either there, and without the prior consent of the other.

Art. 2. If through the weakness of the Moroccan Government, through its impotence to assure order and security, or for any other reason, the maintenance of the *status quo* becomes impossible, the Government of the French Republic and the Government of his Majesty the King of Spain determine as hereinafter follows the limits within which each of them would have the right of reëstablishing tranquility, of protecting the life and property of individuals and of guaranteeing the freedom of commercial transactions.

Art. 3. On the one side: The line of demarkation between the French and Spanish spheres of influence would run from the intersection of the meridian of 14 degrees 20 minutes west of Paris (12 degrees west of Greenwich) provided by the convention of June 27, 1900, with the 26th degree of north latitude, which line will run toward the east to its intersection with the road indicated by a dotted line on the map forming annex No. 1 to the present convention and binding Bir el Abbas, to Mader Ym Ugadir, passing through Tinduf. From this point of meeting, it will run northwesterly and to the intersection of the Wad Merkala by the said road, the use of which will be

[1] On Nov. 10, 1911, *Le Figaro* published a text "which had probably been transmitted to it by the Spanish embassy and which has given rise to no denial by the French ministry of foreign affairs."

common in this section to French and Spanish nationals, the soil of the road as well as of Tinduf and of its vicinity remaining however within the French sphere of influence; running from this point of intersection, the line of demarkation will mount the *thalweg* of the Wad Merkala to its source, to reach at that point, directly, by the parallel passing through the said source the 10th degree of longitude west from Paris (7 degrees 40 minutes west from Greenwich), which it will follow northward to its meeting with the Wad Draa. Thence it will mount, by the *thalweg*, the Wad Draa to Buna mounting by the affluent of the Draa which rejoins it near Beni Smigin toward the north, and following it to Taghbalt; from there, it will rejoin Tirzin Urkan and passing between Ymitez and Tiilit toward the source of the Wad Dades ascend the ridges of the Atlas which it will follow in descending to Cape Ghir, passing by Tizi (peak) u Rijint, Ait Ymi, Teluet, Tagharat, Tushka, Bibana and Bibawan. It is understood that in case of doubt the principle that the line of demarkation will be that of the watershed will always be adhered to for securing the exactitude of this delimitation.

It is also understood that, as relates to the commerce of the caravans of the Sus the Spanish Government may establish *entrôpôts* at Tinduf, where the said caravans will also have the right of using water.

On the other side: The line of demarkation between the spheres of French and Spanish influence will begin on the coast of the Atlantic Ocean from the mouth of the Wad Sebu from whence it will ascend the *thalweg* from the sea to its confluence with the Wad Mikkes. By their *thalwegs* it will ascend this river and that one of its branches which passes through Medhuma. From the source of this last watercourse, the line of demarkation will reach directly the ridge of Jebel Beni Mtir, which, as well as the ridge of Jebel Ait Yussi it will follow to the Wad Sebu, from which it will ascend the *thalweg* and that of its first affluent on the right. From the source of this latter watercourse, it will reach as directly as possible the source of the nearest affluent of the Wad Bu Zennelan, and will descend these two watercourses to the Wad Ynauen. It will thence follow the *thalweg* of this river to its source, then will begin again through Taza and Riata, following the ridge of the mountains Rejidam, and will thence follow the course of the Muluya to Meduhar and its outlet into the Mediterranean.

Art. 4. The two high contracting parties, recognizing the importance of the position of Tangier in relation to the necessary freedom of the strait of Gibraltar, will not eventually oppose the neutralization of this city.

Art. 5. In affirming the absolutely pacific character of the present convention, the two high contracting parties decide that if either, for the protection of its interests within its sphere of influence, must resort to force, it will make known to the other in advance the necessity in which it finds itself.

If, during the period of the *status quo*, one of the two high contracting parties, as a result of injury, prejudice or menace to its interests, sees itself reduced to exercise, in order to obtain satisfaction, a temporary coercive action at any point of Moroccan territory, it will make known to the other in advance the necessity in which it finds itself.

Art. 6. In questions which may be raised regarding the present convention, the two high contracting parties will lend to each other the support of their diplomacy.

Art. 7. French ships will enjoy all the facilities which Spanish ships shall be allowed to access by sea from the Wad Sus, Wad Sebu and the Muluya into Spanish ter-

ritorial waters. It will be the same on a reciprocal basis for Spanish ships in French territorial waters, and access by sea from the rivers comprised in its zone of influence.

Navigation and fishing will be free for French and Spanish nationals in the common rivers or parts of rivers.

The policing of navigation and fishing in those rivers or parts of rivers, in the French and Spanish territorial waters at the approaches of the Wad Sus, the Wad Sebu and the Muluya and the others comprised in this convention, as well as the other questions relating to lighting, buoyage, and the management and use of the waters will be the object of arrangements concerted between the two governments.

The rights and advantages which derive from the present article, being stipulated on account of the common or border character of the bays, river mouths or rivers above mentioned, will be exclusively reserved to the nationals of both of the two contracting parties and cannot in any manner be transferred or conceded to the nationals of other nations without the prior agreement of the two high parties today contracting.

Art. 8. No differential right in relation to navigation, customs and transportation by railroad, and generally no privilege of a commercial order shall be established in the spheres of influence delimited by the present convention. All facilities of transit and of circulation will be given, for commerce coming from the interior or destined thither, in and through the territories recognized as forming part of the Spanish and French spheres of influence, as they are delimited in Art. 3 of the present convention.

Art. 9. Neither of the two high contracting parties can, without the consent of the other, alienate all or part of the territories placed within its sphere of influence.

Art. 10. The lines of demarkation determined by Art. 3 of the present convention are traced on the maps subjoined (annexes Nos. 1 and 2). In case there would be occasion to apply them on the ground, it is agreed that so far as possible account will be taken of the position of the border tribes.

Art. 11. The present convention, being intended to remain secret, cannot be divulged, communicated or published, in whole or in part, without a prior agreement between the two high contracting parties.

On December 3, 1902, Sagasta fell, with the project of treaty unsigned. On Dec. 6th Señor Silvela formed a new ministry and the treaty project never went further, though it would have given Spain the best part of Morocco. Why Spain failed to sign the treaty, and therefore why the Moroccan question became a European one in the way that it did is now known, thanks to the careful research of M. Rouard de Card.[1] In April, 1904, the Anglo-French convention was signed, and resulted in a repercussion at Madrid. In the first ten days of June, Morocco in general was the subject of debate in the Cortés. Two of the Sagasta ministry hinted at the secret treaty. The Duke of Almodóvar, Sagasta's

[1] La Question marocaine et la Négociation franco-espagnole de 1902. Paris, 1912.

minister of foreign affairs and therefore one of its negotiators, in this debate said:

> Señor Sagasta considered it indispensable that Señor Silvela, who was to be his successor in the government, should have a complete, authenticated and exact knowledge, as full as was necessary and as we who prepared it had. So that it is understood that Señor Silvela as head of the government refused to realize or to achieve what the Liberal government had left to be concluded and which lacked only the final touch; that Señor Silvela had assented to what was done and that, moreover, he admired it, I can prove.

Naturally Señor Silvela felt the imputation and sought to have his say. His reply was published in *Imparcial* on June 11, 1904, and was reprinted in pamphlet form. The letter deals with Spanish politics and with personalities to a large extent. He cited his article of August, 1901, in *La Lectura* and repeated its burden. "I have spent the best and even a part of the worst of my life in saying to my superiors, my friends and my adversaries that everything which would not tend to preserve the "*status quo* in Morocco must be considered as pure folly," he wrote. "But I say and repeat: This *status quo*, so wise and so worthy of praise, has an inconvenience which destroys all its advantages, namely, it is impossible. In the face of foreign interferences whose eventuality was in my opinion near at hand, I counselled the *entente cordiale* with France, whose interests can be harmonized with ours without doing violence to those of other friendly powers." He mentions his interview with the Duke of Almodóvar and continues:

> I considered, and continue to consider, excellent everything that the Spanish Government had concerted with the French Government and I conveyed to you my felicitations, being persuaded that it would be a work of peace and concord assured against any suspicion and any dissatisfaction by friendly powers.—Three months passed without any one saying anything of the projected convention. When I was called to the counsels of the Crown, I found this convention unsigned.—It belonged to me to propose and decide on a matter so important. From the sources of information one in the exercise of power has, I learned how it was necessary to insure our action in Morocco against possible difficulties raised by interested third parties. At the moment very important questions were pending between France and England. To overcome the difficulties and the obstacles which we should have to meet, to offset the compensations and guaranties which were sought from us in exchange for and under the pretext of the expansion of our influence on the African coast, France would offer us her diplomatic support, which was not sufficient to reassure us in this circumstance. I thought that it was an imperious duty to suspend the signing of the treaty until all doubts had disappeared from my own mind, and also to agree to nothing on the subject of territories and spheres of influence on the African littoral

without previously making completely *au courant* of the affair the friendly powers (Great Britain) which had a title and the means of being heard in this negotiation.

The principles of the treaty project are today the basis of Moroccan division under the Franco-Spanish convention of November 27, 1912, notwithstanding all the intervention that occurred from 1905 on. Great Britain and France two years later acknowledged Spanish special interests by Art. 8 of the declaration of April 8, 1904, and the secret Franco-Spanish convention of October 3, 1904, reiterated the territorial division contemplated in 1902 but took account of the increasing French influence by a decrease of the extent of the Spanish spheres of influence. Though the convention of 1904 was secret, it became known to the German diplomats at Madrid shortly after its signing and the plans it indicated for dividing Morocco between France and Spain, thereby closing a market and throwing large potential mineral resources out of competition particularly into French control, are assigned as reasons for the Kaiser's dramatic visit to Tangier in the spring of 1905 and the international status of the Moroccan question resulting from the Algeciras Conference.

THE ATTEMPT OF TURKEY TO ABROGATE THE CAPITULATIONS

The Department of State was officially informed by the Turkish Ambassador on September 10, 1914, that on and after the first of October the Ottoman Government had determined to abrogate the conventions known as the "Capitulations" which he stated "restrict the sovereignty of Turkey in her relations with certain Powers." The United States is one of these Powers. It was further stated that "all privileges and immunities accessory to these conventions or issuing therefrom are equally repealed." The purpose was to remove "an intolerable obstacle to all progress in the Empire," and the relations of Turkey to the Powers were to be regulated henceforth by "the general principles of international law." There can be no doubt that extraterritorial rights interfere with sovereignty, or at least with its unhindered exercise; that they are, at least at the present day, regarded as a mark of inferiority; and that they are to be considered as marking a stage of transition to the full exercise of sovereignty. But the question arises how rights of this kind are to be abrogated. Can it be done by the country in which they exist without the consent of the country which exercises them? Thus considered, the question involved in the action of the Turkish Government is not what

extraterritorial jurisdiction the United States has in Turkey; but, as previously said, whether Turkey has the right to abrogate, without the consent of the United States, such extraterritorial rights as the United States may possess in the Ottoman Empire. Admitting that the exercise of these rights is obnoxious to Turkey, the question is, what is the proper method of securing their abrogation or relinquishment?

The question of the Capitulations is too complicated for an editorial comment, and the reader is referred to the excellent little book on the subject, entitled *Foreigners in Turkey: their Juridical Status*, published by Mr. Philip Marshall Brown, Assistant Professor of International Law and Diplomacy in Princeton University.

A judicial statement of the origin and nature of the Capitulations in general and the rights of the United States in particular will be found in the case of Dainese *v.* Hale, 91 U. S. Reports, 13 (1875), and a much more elaborate discussion in Dainese *v.* The United States, 15 Court of Claims Reports, 64 (1879). From this latter case two paragraphs are quoted:

> The "usages of the Franks" begin in what are known in international law as "the capitulations," granting rights of exterritoriality to Christians residing or traveling in Mohammedan countries. Some ingenious writers attempt to trace these capitulations far back of the capture of Constantinople in 1453 by the Turks. (1 Féraud-Giraud, *Juridiction Française dans les Échelles*, 29 *et seq.*) They are undoubtedly rooted in the radical distinction between Mohammedanism, which acknowledges the Koran as the only source of human legislation and the only law for the government of human affairs, and the western systems of jurisprudence, which are animated by the equitable and philosophical principles of Roman law and Christian civilization. But their accepted foundation in international law is in the treaty made with the French in 1535, which guaranteed that French consuls and ministers might hear and determine civil and criminal causes between Frenchmen without the interference of a *Cadi* or any other person. (1 De Testa, 16.) After this treaty the French took under their protection persons of other nationalities not represented by consuls (2 Féraud-Giraud, 76), and hence the generic name of "Franks" was given to all participants in the privileges, and has been preserved in the laws, treaties, and public documents of the United States. (8 Stat. L., 409; 12 Stat. L., 76, sec. 21; 7 Op. Attys. Gen., 568.)
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> Other nations followed the example thus set by the French, as, for instance, the English in 1675 (Brit. & For. St. Pap., 1812–'14, Part I, 750); the Two Sicilies in 1740 (1 Wenckius, 522); Spain in 1782 (3 Martin's Rec., 2d ed., 405); and the United States in 1830 (8 Stat. L., 408). All writers agree that by these and other similar capitulations a usage was established that Franks, being in Turkey, whether domiciled or temporarily, should be under the jurisdiction, civil and criminal, of their respective ministers and consuls. This usage, springing thus not only out of the capitulations, but out of the "very nature of Mohammedanism" (3 Phil., preface, iv), became a

part of the international law of Europe (note to Spanish treaty cited above; 1 *Guide Dip.*, sec. 75; Wheat. *El.*, Lawrence's ed. of 1863, 219–'22, Dana's ed., sec. 110; 2 Phil., sec. 273; 1 Vattel, Pradier Fodéré ed., 625 n.; Bluntschli, *Dr. Int. Cod.*, sec. 269; Calvo, *Dr. Int.*, sec. 495).

In 1856, as a consequence of the Crimean War, the Ottoman Empire was formally admitted into the society of nations, and it has been a source of embarrassment and of annoyance to Turkey that the Powers have not been willing to recognize its right to be master in its own house, although it has since this period been recognized as a member of the society of nations. The Turkish Government has evidently taken advantage of the disordered state of Europe to abrogate extraterritorial jurisdiction, in the belief that both the Triple Alliance—if Italy is still to be considered a member,—and the Triple Entente would be willing to pay this price for Turkish neutrality, and that it could afford to take its chances with the other Powers. It has a precedent for its action at this time in the abrogation by Russia during the Franco-Prussian war of the clause of the Treaty of Paris, which forbade Russian warships in the Black Sea. It appears, however, that the Triple Alliance, composed of Germany, Austria-Hungary and Italy, and the Triple Entente, composed of France, Great Britain and Russia, have protested against the abrogation of the Capitulations, and that the United States, as appears from the following paraphrase of cablegram to the American Ambassador at Constantinople, given to the press, has likewise protested:

> You will bring to the attention of the Ottoman Government that the Government of the United States does not acquiesce in the endeavor of the Imperial Government to set aside the Capitulations.
>
> Furthermore, this government does not recognize that the Ottoman Government has a right to abrogate the Capitulations, or that its action to this end, being unilateral, can have any effect upon the rights enjoyed under the Capitulatory conventions.
>
> You will further state that the United States reserves for the present the discussion of the grounds upon which its refusal to acquiesce in the action of the Ottoman Government is based, and also reserves the right to make further representations in this matter at a later date.

By the treaty of 1830 (Articles 4 and 7), by the agreement of 1874 concerning realty, and by the favored-nation clause the United States obtained certain rights within Turkey, which it is not necessary to discuss at present, for the action of the Turkish Government deprives the United States, not merely of some or other of these rights, but of its extraterritorial jurisdiction in its entirety. What rights the United States may have has been the subject of much discussion, and a clear

determination of them has not been reached. They will doubtless be further discussed in the future.

The method employed by Turkey to denounce, upon its own initiative, extraterritorial jurisdiction, where the United States possessed it, whether by express treaty, by custom or by favored-nation clause, is contrary to the action of other countries in which extraterritorial rights have been claimed and exercised. The traditional policy of the United States has been to make its agreement to renounce extraterritoriality depend upon reforms to be accomplished in the respective countries, and when these reforms have been instituted and the results have been found or are considered satisfactory by the United States, then, and not till then has the United States renounced its extraterritoriality. See the treaty with Korea of 1882 (Art. 4), treaty with Japan of 1894 (Art. 18), treaty with China of 1903 (Art. 15), and the process of abrogation of extraterritoriality now in progress in Siam. In other cases the renunciation of extraterritoriality has not taken place until the native laws and tribunals have been superseded by those of a civilized country which has assumed a protectorate. Reference is made to the abrogation of extraterritoriality in Madagascar, Morocco, Tunis, Zanzibar, and the leased territories in China. In all these cases, however, the relinquishment of extraterritoriality has been accomplished with the consent, often expressed in a formal treaty, and as a voluntary act of the United States.

THE BRYAN PEACE TREATIES

In the July number of the JOURNAL[1] an editorial comment was devoted to Mr. Bryan's peace plan, and the treaty between the Netherlands and the United States was taken as the representative of the group, and its terms analyzed in detail. On August 13, 1914, the Senate advised and consented to the ratification of eighteen of the twenty treaties which had up to that time been submitted to it. The treaties with Panama and Santo Domingo were reserved for further consideration, as the relations between Panama and the United States are of a peculiar character, and the situation in Santo Domingo was far from satisfactory, owing to a revolution which was then in progress. The treaty with the Netherlands was very carefully considered by the Senate and a test vote was taken upon it. Upon its acceptance, the others were advised and consented to as a matter of course. Mr. Bryan's plan of communicating in advance with the Senate Committee on Foreign Relations, laying his plans before

[1] Page 565.

its members, and receiving their approval, has worked admirably and shows that co-operation between the Senate Committee and the Secretary of State is both possible and profitable, if only the Secretary of State takes the members of the Committee into his confidence.

Mr. Bryan, however, has not been content to negotiate treaties with some of the nations. He wishes, on the contrary, to secure agreements of a similar, if not an identical, kind with all the nations that believe in arbitration. On September 15th he had the very good pleasure to sign treaties of this kind with China, Spain, France, and Great Britain. After the signing of these treaties, which will undoubtedly be advised and consented to by the Senate, Mr. Bryan prepared the following statement, which the JOURNAL is able to print through his courtesy:

> The signing of the four treaties with Great Britain, France, Spain and China bring under treaty obligations more than nine hundred millions of people. These, when added to the population of the United States and the population of the twenty-two countries with which similar treaties have heretofore been signed, brings under the influence of these treaties considerably more than two-thirds of the inhabitants of the globe. As these treaties all provide for investigation of all matters in dispute before any declaration of war or commencement of hostilities, it is believed that they will make armed conflict between the contracting nations almost, if not entirely, impossible. This government is gratified to take this long step in the direction of peace and is not only willing, but anxious to make similar treaties with all other nations, large and small. Immediately upon the signing of these treaties, telegrams were sent to the government's representatives in Germany, Russia, Austria and Belgium, communicating the fact of the signing of these treaties and expressing a desire to sign similar treaties with these countries, all of which have endorsed the principle embodied in the plan.

GERMANY AND THE NEUTRALITY OF BELGIUM

The war, it would seem, has barely begun, and yet there are charges and countercharges of the violation of international agreements and of the unwritten laws of humanity. People in an excited state of mind readily believe charges without weighing, as in a balance, the elements of proof, upon which the truth or falsehood of the charges rests, and for the sake of our common humanity it is to be hoped that the proofs will not be forthcoming. The JOURNAL believes it unwise either to enumerate the charges or to attempt to comment upon them, reserving the right at some future time to consider them when the facts are known upon which judgment should be based. It is, however, proper to advert to one charge: namely, the violation of the neutrality of Belgium and of Luxemburg, of which Germany is accused.

There are several documents which should be considered in this connection: (1) the London conventions of 1831 and 1839 concerning the independence and neutrality of Belgium; (2) the accession of the German Confederation to the London convention of 1839; (3) the London convention of 1867 concerning the neutrality of Luxemburg; (4) the treaties of 1870 concerning the neutrality of Belgium between Great Britain and Prussia, and Great Britain and France; (5) the convention respecting the rights and duties of neutral Powers and persons in case of war on land adopted by the Second Hague Peace Conference of 1907.

In 1830, Belgium, which had been united with Holland by the Congress of Vienna, to form the Kingdom of the Netherlands, revolted; and, on November 15, 1831, Great Britain, Austria, France, Prussia and Russia, on the one hand, and Belgium, on the other, entered into a treaty of which the provisions relating to neutrality are as follows:

> Belgium, within the limits specified * * * shall form an independent and perpetually neutral state. It shall be bound to observe such neutrality towards all other states. (Art. VII.)
>
> The courts of Great Britain, Austria, France, Prussia, and Russia guarantee to His Majesty the King of the Belgians the execution of all the preceding articles. (Art. XXV.)

The King of the Netherlands was unwilling at this time to recognize the independence of Belgium, but he finally did so by a treaty signed with Belgium on April 19, 1839; and in a series of treaties of the same date, to which Holland and Belgium were parties, the independence of Belgium was recognized, its neutrality likewise recognized, and the execution of the provisions of the treaties placed under the guaranty of the great Powers. Thus to the treaty of April 19, 1839, the articles of the treaty between Belgium and the Netherlands are annexed, and "are considered as having the same force and validity as if they were textually inserted in the present Act," and "they are thus placed under the guarantee of their said Majesties." Article VII of the treaty of 1831 reappears as Article VII of the new treaty, and is thus guaranteed. Articles I to VII, inclusive, of the treaty of April 19, 1839, were on the same day adhered to by the German Confederation, and this adherence was formally accepted by Great Britain, Austria, Belgium, France, the Netherlands, Prussia and Russia. Article VII guaranteeing the independence and neutrality of Belgium was thus confirmed, not only by the five great Powers, but by all of the German States.

The attempt of Napoleon III, Emperor of the French, to obtain the

Grand Duchy of Luxemburg as the price of his neutrality in the war of 1866 between Prussia and Austria, led to the convention of London between Great Britain, Austria, Belgium, France, Italy, Netherlands, Prussia and Russia, by which the Powers in question engaged to respect the neutrality of Luxemburg, and, with the exception of Belgium, to guarantee its neutrality. The material portion of this important treaty follows:

> Article II. The Grand Duchy of Luxemburg, within the limits determined by the act annexed to the treaties of the 19th of April, 1839, under the guarantee of the courts of Great Britain, Austria, France, Prussia, and Russia, shall henceforth form a perpetually neutral state. It shall be bound to observe the same neutrality toward all other states. The high contracting parties engage to respect the principle of neutrality stipulated by the present article. That principle is and remains placed under the sanction of the collective guarantee of the Powers signing the present treaty, with the exception of Belgium, which is itself a neutral state.

The outbreak of the war of 1870 between Prussia and the German States, on the one hand, and France on the other, raised doubts in the minds of the British statesmen as to the preservation of Belgian neutrality, for Belgium was then, as now, a highway between the two belligerents. Great Britain, therefore, entered into a treaty with Prussia of August 9, 1870, and on the 11th of August, 1870, with France, which, without affecting the guaranty of 1839, specified that each of the belligerents would observe Belgian neutrality during the war, and Great Britain pledged itself to preserve by force of arms the neutrality of Belgium, if it were violated by one or the other of the belligerents.

The matter, however, does not rest here. The Hague Convention, to which reference has been made, provides in its first article that "the territory of neutral Powers is inviolable;" Article 2, that "belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power;" Article 5, that "a neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory;" and Article 10, that "the fact of a neutral Power resisting, even by force, attempts to violate its neutrality can not be regarded as a hostile act." The official report of the Conference says that Articles 1 to 11 were unanimously adopted (*Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. 1, p. 125), and the convention was signed and ratified by Germany, and the ratification thereof deposited at The Hague November 27, 1909. It should be said, however, that this convention contains the clause in Article XX, that

"its provisions do not apply except between contracting Powers, and then only if all the belligerents are parties to the convention." It appears, however, that Servia has not ratified this convention.

On August 4, 1914, Dr. von Bethmann Hollweg, Chancellor of the German Empire, said, in a speech to the Reichstag, as quoted in the London *Times* of August 11, 1914:

> Gentlemen, we are now in a state of necessity, and necessity knows no law! Our troops have occupied Luxemburg, and perhaps are already on Belgian soil. Gentlemen, that is contrary to the dictates of international law. It is true that the French Government has declared at Brussels that France is willing to respect the neutrality of Belgium as long as her opponent respects it. We knew, however, that France stood ready for the invasion. France could wait, but we could not wait. A French movement upon our flank upon the lower Rhine might have been disastrous. So we were compelled to override the just protest of the Luxemburg and Belgian Governments. The wrong—I speak openly—that we are committing we will endeavor to make good as soon as our military goal has been reached. Anybody who is threatened, as we are threatened, and is fighting for his highest possessions can have only one thought—how he is to hack his way through (*wie er sich durchhaut*)!

It therefore appears that the Chancellor knew and admitted that the occupation of Belgium and Luxemburg was contrary to international law, but he justified the act by the statement that the German Empire was "in a state of necessity" and that "necessity knows no law."

Some light is thrown on the reasons which may have moved Germany to violate the neutrality of Luxemburg and Belgium by the following passage from General von Bernhardi's *War of Today*, published in 1911:

> * * * An example—of course a mere theoretical one—will illustrate the idea in the simplest manner.
>
> Leaving all political conditions alone, we can very well imagine a German offensive against France being conducted by the northern wing of the German army, with its extreme right along the sea-coast, advancing with the armies echeloned forward through Holland and Belgium, while the German forces in the south evade the blow of the enemy, retiring through Alsace and Lorraine in a north-easterly direction, and leaving South Germany open to their opponent. The advance in echelon of the German attacking wing would force the left wing of the opposing army into making a great change of front, bringing it by this means alone into an unfavorable situation; but in the south the French would likewise be obliged to carry out a strategic left wheel, thereby getting into an unfavorable position as to their base. Strategically would here be attained what Frederic the Great achieved by his attack in echelon at Leuthen tactically.
>
> A German success in the north would lead straight on Paris, and touch the vital arteries of the French army much sooner than the latter could gain decisive results in South Germany. In such a case the position of the French army portions which

had penetrated into South Germany would likely become extremely critical, as they would find their line of retreat most seriously threatened from the north.

There is no need at all for any specially intricate and difficult movements of the German army. It would be chiefly a question of properly distributing the forces and regulating the extent of the retrograde movement of the left wing. That must never be allowed to go so far as to expose the lines of communication of the German right wing. The pivot of the movement, which might be fixed somewhere in northern Lorraine and Luxemburg, must be vigorously held, too. People have therefore often thought of turning Trier into an army fortress, and the idea of fortifying Luxemberg is also partly based on similar points of view. These reflections show, at any rate, the prominent importance of the fortress of Mainz. It would be, further, advisable to hold a strategic reserve in a central position, ready for reinforcing, in case of need, either the right or the left wing.[1]

GERMANY AND INTERNATIONAL PEACE

The position of Germany at the Second Hague Conference on the subject of arbitration has been much discussed and no little criticized. At a session of the Reichstag held April 28, 1914, the Director of the Foreign Office, Dr. Kriege, German delegate to the Second Hague Peace Conference and to the London Naval Conference, explained and defended the attitude of Germany in 1907, and in the course of his remarks made some very interesting observations, not merely concerning arbitration and the judicial decision of international difficulties, but concerning the meeting and labors of a Third Peace Conference, in which Germany would be represented, and from which he expected great results.

The first paragraph of this address[2] aims to show that Germany is friendly, not merely to treaties of arbitration, but to the arbitration of concrete difficulties; that it has negotiated two treaties of arbitration—one with Great Britain, which has been twice renewed, and the other with the United States of America, which, however, has not become effective—and that it has inserted the arbitral clause in a series of commercial treaties. Dr. Kriege calls attention also to the fact that Germany proposed the creation of an International Prize Court at the Second Hague Conference, and that at the last Hague Conference on Bills of Exchange, the German delegation advocated the creation of an international court of appeal to decide conflicts of private international law. He further calls attention to the treaties between France and

[1] Von Bernhardi's *War of Today*, authorized translation by Karl von Donat, pp. 328–329.

[2] The translation of Dr. Kriege's remarks is made from the text as contained in the "Zeitschrift für Völkerrecht," Vol. 8 (1914), pp. 460–462.

Germany concerning the Morocco question, and the presence of an arbitral clause to settle disputes arising from the Moroccan situation, and finally, he mentions the two controversies which Germany submitted to the Permanent Court of Arbitration at The Hague: the well known Venezuelan preferential case and the Casablanca case. This part of Dr. Kriege's speech follows:

> The idea has gone abroad that Germany has but little sympathy with the idea of settling difficulties through arbitration. But this is not at all so. In 1904 Germany concluded a general arbitration treaty with Great Britain which it has renewed twice since. A similar treaty had been concluded with the United States of America, but owing to the opposition of the American Senate, it was not ratified. In a series of more recent commercial treaties arbitration clauses were included so that all disputes regarding tariff questions are to be laid before special arbitration courts. At the Second Hague Peace Conference Germany proposed the institution of an International Prize Court, and this proposition was accepted. At the last Hague Conference upon the Laws of Exchange the German delegation moved to consider the institution of an international court of appeals which would be competent to decide disputes in the field of private law arising from international treaties. But above all, into the important treaties which it has concluded with France for the settlement of the Morocco question, Germany has inserted a non-reserving arbitration clause, as a result of which any and all disputes arising from its application should be submitted to the decision of an arbitration court. Nor has Germany in distinct cases hesitated to consent to have disputes of primordial importance decided by the Hague Arbitration Court, such as the Venezuela and Casablanca disputes.

Dr. Kriege's statement as to the rejection of the arbitration treaty by the Senate of the United States is not quite accurate. It is true that the treaty was signed and that it was laid before the Senate for its advice and consent. It was amended by the Senate by striking out the expression "special agreement" and substituting therefor "special treaty," so that the *compromis*, to use a technical term, or the submission of the case to arbitration, would require the approval of the Senate. Mr. Roosevelt, then President, was unwilling to accept the amendment and dropped the whole matter. However, later, when Mr. Root was Secretary of State, the United States tried to negotiate a treaty of arbitration, in which the right of the Senate was reserved to approve the *compromis;* but Germany refused to conclude such a treaty.

Dr. Kriege next proceeds to state the attitude of the German delegation toward arbitration at the Second Hague Conference, and the two paragraphs devoted to this are here quoted:

> If the German delegation delined to assent to the world arbitration treaty proposed at the Second Hague Peace Conference, it took this stand because it felt convinced

that such a treaty would not be serviceable to the cause of peace. In accordance with this proposition, all controversial legal questions, especially those in reference to the application and interpretation of international treaties, were to be submitted to arbitral decision with the condition, that neither the vital interests nor the independence, nor the honor of either of the parties in dispute should be in conflict therewith. In its delimitation, in its execution and its effects, such a treaty would be so unclear, so uncertain and so doubtful that it could not but lead to the greatest difficulties and disputes between the treaty states. Limitation of the treaty to legal questions is necessary because mere questions of interests cannot in their nature be submitted to arbitral decision. But no way could be found to separate in a clear manner the legal questions from the question of interests. The further matter of excluding disputes of secondary importance from the arbitral decision in reference to the time and expenses connected therewith, the Conference was unable to settle. It is even more difficult to insert the so-called clause of honor, that is, the right of each Power to decide independently whether in a particular case it would decline to accept an arbitral decision in reference to its vital interests, independence or honor. This clause, whose need was justly recognized by the Conference, would indeed have rendered the treaty illusory, because it would merely have been a treaty with the clause "si volo." An appeal to this clause is furthermore of such a nature as to further embitter the dispute between the parties, because in so doing the suspicion might be entertained that the opponent is not acting in a *bona fide* manner, but that realizing that he is wrong wishes to avoid the arbitral decision. And it is furthermore doubtful as to what effect an arbitral decision might exercise upon the judicial or the legislative authority of a treaty if one of these authorities, through the violation of international obligations, has brought about the dispute. In such cases, shall the judicial authority or the legislative authority be compelled to take the arbitral decision into account, or shall these authorities remain sovereign in respect of the arbitral decision? There was complete difference of opinion at the Conference with regard to this matter, so that in adopting the treaty, the uniformity of the intentions of the treaty would from the first have been absent.

The aforesaid considerations at the Conference brought it about that, not only Germany, but several of the other great Powers and a number of smaller states disapproved of the universal arbitration treaty. In fact the experiences that various Powers would have encountered with an arbitration treaty such as we have been considering, could only have strengthened the uncertainties pointed out.

The objections to the proposed arbitration treaty are indeed forcibly stated, but it would have been possible to prepare a draft which would have been free from most of these objections, if the German delegation had shown itself willing to co-operate rather than to criticize. Indeed, the Conference was much encouraged by the seemingly frank acceptance of the principle of arbitration by the first German delegate, Baron Marschall von Bieberstein, who stated, on behalf of his delegation: "We are ready to examine conscientiously and impartially the propositions which already have been made and those which may yet be presented on

this subject." (*Deuxième Conférence Internationale de la Paix* (1907), *Actes et Documents*, Vol. II, p. 288.)

Admitting for the moment that Germany's objections to the various proposals were well founded, it would have been possible for the delegation to have proposed a form which would have obviated these objections, but this was not done, and it may be said in no unkindly spirit that Germany's attitude on the entire subject was negative, not constructive. The last paragraph of the quotation is likely to lead to some misunderstanding, if a word of explanation be not added; for, however faulty the final draft may have been, it was nevertheless approved by thirty-two delegations, nine opposed it, and three abstained from voting. Dr. Kriege's remarks would lead the casual reader to believe that several large Powers voted against it, whereas, as a matter of fact, only Germany and Austria-Hungary voted against it, and Italy, which is known to be strongly in favor of arbitration, abstained from voting. It seemed to the delegates at the time that Germany's influence in the Triple Alliance had made itself felt. The character of the opposition is best seen by enumerating the states which voted against the proposal: Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Montenegro, Roumania, Switzerland, and Turkey. The three states abstaining from the vote were Italy, Japan and Luxemburg. The delegations of all the other states voted in favor of the general treaty, so that it is fair to say that, notwithstanding the imperfections of the projected treaty, the overwhelming majority of the states represented at the Conference expressed themselves in favor of it.

However, it is no small encouragement to the partisans of general arbitration to learn from Dr. Kriege's carefully worded remarks that, whatever his scruples may be against the arbitration of political questions, or controversies in which the clashing interests of the countries are involved, he, and presumably his country, are in favor of the arbitration of legal questions. It may be indeed difficult to separate the purely legal from political disputes, and yet this must be done, and it is believed that, if the Third Hague Conference would negotiate a treaty for the peaceful settlement of legal disputes, preferably by means of an international court in the technical sense of the word, Germany would be a party to such treaty, and the cause of peaceable settlement would be greatly advanced. Indeed, there is much to be said for the proposal which Dr. Kriege makes, and it is believed that it is possible to draw the line between legal questions and questions of a political nature, even although it is difficult.

In another paragraph Dr. Kriege states the readiness of his government to ratify the Declaration of London, which supplies the law which the International Prize Court is to apply under Article 7 of the Prize Court Convention, and he also states the willingness of his government to co-operate in the establishment and operation of the International Prize Court which, it should be said in passing, the German delegation proposed at the Second Hague Conference. Dr. Kriege's language on this point is so clear and decided as to merit quotation:

> The Hague agreement regarding the establishment of an International Prize Court and the Declaration of London in reference to the laws of naval warfare had in time been signed by the states most directly concerned in the matter, and Germany among them. Germany is ready to ratify both treaties at an early date, and the more so in view of the fact that she was the proponent of the proposition to establish the International Prize Court. The difficulties encountered in the realization of the two great international treaties came from England, not from the British Government nor indeed from the House of Commons, but from the House of Lords, which had declined to accept both treaties. The British Government endeavors to remove these difficulties by trying to secure an authentic interpretation of certain provisions of the Declaration of London through negotiations with Germany and other great Powers. We have tried to meet the British Government in this matter as far as this was possible, and we have indeed reason to believe that these negotiations will attain the desired end, so that the British Government will ere long be in a position to lay the treaties anew before its Parliament with the prospect of a successful issue. As regards the meeting of the Third Hague Peace Conference, Germany is indeed in sympathy with that object, although she may believe that the most important results of the former Conference should first be realized, that is, the two great treaties referred to should be ratified. If it were intended to take up without interruption the discussion of new international problems, before those hitherto discussed have been brought to realization, these Conferences would soon lose the worth attaching to them. The Second Hague Peace Conference has expressed the wish that such a program should be elaborated by an international commission, and then be submitted for the approval of the governments. In regard to the composition of this commission, negotiations had at the proper time been entered into, but they have not as yet led to any definite conclusions.

Finally, Dr. Kriege states his desire, and doubtless the desire of his country, for a Third Hague Conference, and expresses the belief, in the following passages, that the Conference, which we all hope will meet in the near future, will render great services to the cause of peace:

> Meanwhile the Foreign Office is already at work preparing the propositions with regard to the program to be offered by Germany, because that office, in view of its organization and experience, is best able to judge those international questions whose solution needs to be considered by the Conference. All the other departments of the government having any relation to these matters and eminent teachers of international law have of course been called upon by the Foreign Office to participate in this work.

The hope that the Third Hague Peace Conference may take place rests on well founded grounds, and Germany, well prepared to take up this work, will take part in that Conference. Germany feels convinced that through the solution of important international problems the Conference will exercise great influence in settling disputes and she will therefore deserve well of the cause of peace.

Dr. Kriege is a sincere, upright, and honest man. He expresses his opinions freely and without reserve, whether those opinions are agreeable or displeasing to his audience. He possesses the confidence of his government, and there is every reason to believe that the views expressed in the address from which the quotations have been made are the views which Germany has formed after great deliberation, and which Germany will be prepared to maintain at the next Hague Conference. That it may come soon; that the war which is plaguing mankind may soon cease; and that the nations may again meet at the little city of The Hague in the very near future and devise measures for the benefit of the nations of the world without exception is the hope of every lover of his kind.

A CARIBBEAN POLICY FOR THE UNITED STATES

An editorial comment in the July number of the JOURNAL [1] was devoted to the nature and the origin of the Platt Amendment, and it was suggested, without going into details, that the policy which dictated the amendment was capable of a larger application. It is the purpose of the present comment to take up this subject and to consider it from the larger point of view.

It may be stated in this connection that the amendment, although restricted to Cuba, contemplated the independence of the country to which it was to be applied, a republican form of government, assuring personal liberty and the protection of property in the sense in which these terms are used and understood in constitutional government, a solemn engagement on the part of the country covered by the amendment not to enter into any treaty or engagement with a foreign Power calculated to impair or to interfere with its independence, and that public debts should not be created in excess of the capacity of the ordinary revenues, after defraying the current expenses of the government, to pay the interest.

It is one thing, however, to undertake engagements of this kind; it is quite another thing to carry them out. A promise without performance would be a vain thing, and, as the United States intended to guarantee the independence of Cuba and as the provisions of the amend-

[1] Page 585.

ment previously quoted were devised for this purpose, it was essential in the opinion of Mr. Root, who, as Secretary of War, drafted the amendment and officially interpreted it, to reserve to the United States the right of supervision, in order to justify the United States in guaranteeing the independence of the particular country in question.

The obligation which the United States was willing to assume was not unlimited, but was conditioned upon the obligation set forth in the amendment which Cuba assumed. The failure to comply with these conditions would free the United States from its obligation. Therefore, Mr. Root reserved the right, and properly so, of the United States to intervene, not generally, but specifically "for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty." As, however, intervention has often been invoked to the detriment, as history shows, of the country subject to intervention, Mr. Root, as an upright and straightforward, prudent and far-seeing statesman officially interpreted the right of intervention in such a way as to exclude any and all thought of its abuse. Thus, in the gloss placed upon the amendment in an instruction to General Wood, the Military Governor of Cuba, he stated that the right of intervention was not "synonymous with intermeddling or interference with the affairs of the Cuban Government," but that it was to be "based upon just and substantial grounds," namely, "for the preservation of Cuban independence, and the maintenance of a government adequate for the protection of life, property, and individual liberty." It is true that he coupled with this the obligations "imposed by the Treaty of Paris on the United States," but this clause is of a special nature, involving, as it does, the interpretation of a definite treaty, and may be dismissed without comment in considering the applicability of the amendment from a broader point of view.

So much for the amendment as applied to Cuba. When Mr. Root drafted the amendment in his letter of instructions, dated February 9, 1901, to the Military Governor of Cuba, a great change had taken place in the international relations between the Latin American republics to the north of the Isthmus of Darien and the United States. Negotiations had been begun to abrogate the Clayton-Bulwer Treaty of April 19, 1850, between Great Britain and the United States, which contemplated the construction, supervision, and protection of a channel of communication between the Atlantic and the Pacific oceans by the contracting parties. The first Hay-Pauncefote Treaty of February 5, 1900, which

was, however, amended by the Senate in such a way as to be unacceptable to Great Britain, had been signed. The new and existing Hay-Pauncefote Treaty, dated November 18, 1901, was in process of negotiation and was the subject of much thought and reflection by the American Government, and in framing the amendment subsequently to be known as the Platt Amendment, Mr. Root had in mind the changed conditions incidental to the construction of a canal through the Isthmus of Panama, under the new treaty which acknowledged the right of the United States to build the canal without the co-operation of Great Britain, and gave it the right and imposed upon it the duty to protect the canal also without the co-operation of Great Britain. The privilege was an onerous one, for right and duty are correlative terms. The approaches to the canal must be safeguarded, and disorder in the countries to the north of the route and to the south of the Rio Grande would seriously impair the usefulness of the canal when built. The attitude of the United States toward Cuba through a long period of years has shown conclusively that the United States would not permit the island to pass under the control of any of the great Powers. This is equally true of the republics of Haiti and Santo Domingo in the Caribbean Sea, and of the republics to the north of the proposed canal.

As the second Hay-Pauncefort Treaty was between Great Britain and the United States, neither of which owned the territory through which the canal would pass, the United States need to enter into negotiations with the sovereign of the territory. The Hay-Herran Treaty of January 22, 1903, was, therefore, concluded between Colombia, then owner of the Isthmus, and the United States, giving the United States a right of way across the Isthmus. Advised and consented to by the Senate of the United States, the treaty was rejected by Colombia. Panama shortly thereafter revolted and established its independence, which the United States formally recognized and guaranteed to preserve in a treaty with Panama, dated November 18, 1903, which treaty gave the United States a right of way across the Isthmus for the construction of the canal in accordance with the terms of the Hay-Pauncefote Treaty of November 18, 1901.

It is thus seen that the negotiations resulting in the right to acquire, operate and control the canal were begun during the American occupation of Cuba, although they were terminated after the withdrawal of the American army on May 20, 1902, and the connection between the amendment and the canal suggests itself to the reader without further

comment, as the connection was undoubtedly evident, not merely to Mr. Root, Secretary of War, but to Mr. Hay, Secretary of State. The United States desires the independence of Cuba; it also desires the independence of the republics in the Caribbean and to the north of the canal. It wishes a government in Cuba adequate to maintain its independence and to guarantee life, liberty and the protection of property. It also wishes such a government in the republics in the Caribbean and to the north of the canal, not merely because it is interested in the independence of these republics, and in constitutional government generally, but also because the islands are within a stone's throw, as it were, of our territory, and because the countries to the north of the canal must be independent and orderly governments, if the canal is to be useful not merely to the United States and to them, but to the world at large.

The value to each of the republics of a stable and orderly government is no less important to them than it is to the United States, and there seems to be every reason in favor of a closer relationship, which shall guarantee law and order in each of them without jeopardizing independence. The obligation to maintain a stable government, to keep its public debt within the limits of the ordinary revenues, the duty to protect life, liberty and property do not seem to be too great a price for the guarantee of independence. This is exactly what each government wishes without such a guarantee, and the supervision necessary to secure these just and beneficent ends, does not derogate from independence and the exercise of sovereignty within the limits of international responsibility, as is shown by the experience of Cuba. That the right of intervention, "not synonymous with intermeddling or interference," reserved in the Platt Amendment, as interpreted officially by Mr. Root, will not be dangerous to the independence and development of the countries, is shown by the intervention of the United States in Cuba in 1906 and the withdrawal of the United States in 1909 upon the cessation of the disorders which caused the intervention.

It is believed, therefore, that the essential features of the Platt Amendment, due to the wisdom and foresight of Mr. Root, can properly form the basis of a policy of the United States toward the republics in the Caribbean Sea and to the north of the Canal Zone, as its sole purpose is to maintain independence and constitutional government, and that the republics can, in exchange for the guarantee of independence, properly accept the principles of the amendment, meant solely to maintain their independence against the world and their well-being at home.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Vie Int.*, La Vie Internationale, Brussels; *Arch. dipl.*, Archives Diplomatiques, Paris; B., boletin, bulletin, bolletino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletin de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain, Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L'Int. Sc.*, L'Internationalism Scientifique, The Hague; *Mém. dipl.*, Memorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *Martens*, Nouveau recueil générale de traités, Leipzig; *Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

January, 1914.

24 HONDURAS—UNITED STATES. Honduras ratified the treaty signed November 3, 1913, providing for the settlement of any differences which might arise between the two governments according to the "peace plan" of the Secretary of State of the United States. Spanish text: *B. Rel. Ext.* (Chile), *4*:55.

29 HONDURAS—ITALY. Honduras ratified the general arbitration treaty signed Dec. 8, 1913. Spanish text: *B. Rel. Ext.* (Chile), *4*:55.

March, 1914.

26 CHILE—ITALY. Exchange of ratifications of general arbitration treaty signed Aug. 8, 1912. Italian text: *R. di dir. int. 3* (2 ser.): 256; Spanish text: *B. rel. ext.* (Chile), *4*:28.

April, 1914.

15 INTERNATIONAL SANITARY CONFERENCE. This conference met at Montevideo to consider the revision of the convention signed at Rio de Janeiro June 12, 1904. Argentine Republic, Brazil, Paraguay and Uruguay sent delegates. *B. rel. ext.* (Chile), *4*:39.

April, 1914.

16 SUGAR CONVENTION. Signed by Belgium, France, Netherlands, Russia, Germany, Greece, Italy and Portugal. French text of convention: *Mém. dipl.*, *52*:282.

22 BELGIUM—COLOMBIA. Exchange of ratifications of the extradition convention signed Aug. 21, 1912. French text: *Mém. dipl.*, *52*:280.

May, 1914.

2 GERMANY—TURKEY. By an exchange of notes the commercial convention which expired June 15, 1914, has been continued. *Mém. dipl.*, *52*:242.

29 FRANCE—ITALY. Accord signed relating to Italians in Tunis and Tunisiens in Italy. French text: *Mém. dipl.*, *52*:281.

June, 1914.

8 PERU—VENEZUELA. Peru ratified the arbitration convention signed January 25, 1912. Spanish and English texts: *B. rel. ext.* (Venezuela), *4* (2): 1066, 1126.

16–July 30. SPITZBERGEN. The conference in relation to Spitzbergen convened at Christiania, Norway, June 16th, in response to a call from the Norwegian Government. Germany, France, United States, Denmark, Great Britain, Norway, Netherlands, Russia and Sweden were represented. The archipelago of Spitzbergen is no-mans-land, or *terra nullius*, and the nations interested in questions relating to the islands have declared their intention to preserve this status. It was the purpose of the conference to frame a neutral administration over the islands which should not be subject to the exclusive control of any one nation. The United States participated in the conference solely on account of the economic interests of American citizens there. The conference failed to complete its labors and adjourned July 30th, to meet at a future date.

21 ITALY—SAN MARINO. Ratifications exchanged of the treaty of friendship signed Feb. 10, 1914. Italian text: *R. di dir. int.*, *3* (2 ser.):261.

26 THIRD HAGUE CONFERENCE. The Netherland Government invited the Powers to name each one member of a preparatory committee to meet in 1915 to consider the questions to be brought before the Third Hague Conference.

June, 1914.

28 EUROPEAN WAR. Archduke Francis Ferdinand of Austria, assassinated, with his wife, at Serajevo.

July, 1914.

7 ITALY—PERU. Accord signed relating to consular affairs. Italian text: *R. di dir. int., 3* (2 ser.):260.

10 MEXICO. General Huerta appointed Chief Justice Francisco Carbajal, Minister for Foreign Affairs. On July 16th General Huerta tendered his resignation to the Chamber of Deputies, which promptly accepted it. Dr. Carbajal took the oath of office as provisional president. All attempts of the provisional government to make terms with General Carranza failed, the latter insisting on the unconditional surrender of the government. On Aug. 13th Dr. Carbajal transferred the executive power to the Federal Governor of the District, Gen. Iturbide, who at once transferred it to Gen. Obregon of the Constitutionalist army. General Carranza entered Mexico City and took the oath of office on Aug. 20th. The $60,000,000 of gold bonds on notes issued by General Huerta have been repudiated and the old stamp taxes, which were doubled, have been restored. Señor Isidro Fabela has been appointed Minister for Foreign Affairs. General Villa took no part in the entry of General Carranza into Mexico City and remains in the north. No disorders are reported in Mexico City. The United States troops are to be withdrawn from Vera Cruz. *Independent*, July, August.

10 GREECE—TURKEY. The two governments have requested Switzerland to designate an arbitrator to settle the differences existing among the members of the mixed Greco-Turkish commission sitting in Smyrna for the purpose of arranging the immigration questions. The commission was appointed to exchange the property of Turkish and Greek refugees, and make valuation of the properties concerned. *N. Y. Times*, July 12, 1914.

13 ITALY—SPAIN. Ratifications exchanged of the treaty of commerce and navigation signed March 31, 1914. French text: *R. di dir. int., 3* (ser. 2):258.

14 PERU—UNITED STATES. Treaty signed following the peace plan of the Secretary of State of the United States. This *Journal*, *7*:863.

July, 1914.

14 CHILE—UNITED STATES. Treaty signed following the peace plan of the Secretary of State of the United States. This *Journal*, *7*:863.

15 UNITED STATES—URUGUAY. Treaty signed following the peace plan of the Secretary of State of the United States. This *Journal*, *7*:863.

23 EUROPEAN WAR. Presentation of Austro-Hungarian note to Servia which was given 48 hours in which to reply. Suppression of the Pan-Slav propaganda and satisfaction for the murder plot was demanded. *World's Work*, September, p. 136.

24 EUROPEAN WAR. Russian cabinet council held. The Austro-Hungarian demands on Servia were considered as an indirect challenge to Russia. *World's Work*, September, p. 136.

25 EUROPEAN WAR. Servian answer stated by Austria to be unsatisfactory. The Austrian Minister and staff left Belgrade. *World's Work*, September, p. 136.

27 EUROPEAN WAR. Sir Edward Grey announced in the House of Commons his proposals for a conference of France, Germany, Italy and Great Britain. The proposals were accepted by France and Italy. *Times*, July 28, 1914.

28 EUROPEAN WAR. Austria declared war against Servia and Servian vessels were seized in the Danube. Text of declaration: *N. Y. Times*, July 29, 1914.

29 EUROPEAN WAR. Austrians occupy Belgrade. *N. Y. Times*, July 30, 1914.

30 EUROPEAN WAR. Partial mobilization of the Russian army. Germany demands that Russia stop the mobilization. *R. of R.* (N. Y.), *50*:290.

31 EUROPEAN WAR. General mobilization ordered in Russia. State of war declared by Germany. *R. of R.* (N. Y.), *50*:291.

Holland, Belgium and Switzerland order general mobilization to protect their neutrality. *R. of R.* (N. Y.), *50*:290.

August, 1914.

1 EUROPEAN WAR. Germany declared war on Russia, after German mobilization had been ordered. France ordered mobilization. Italy, Sweden and Norway announced their neutrality. *N. Y. Times*, Aug. 3, 1914.

August, 1914.

2 EUROPEAN WAR. German troops occupied Luxemburg. Germans moved on Longwy and invaded France near Nancy. Russian troops invaded the German Empire at Edytkuhnen and Eighenried. *Independent*, 79, p. 202.

Germany demanded passage across Belgium and was refused. *R. of R.* (N. Y.), *50*:291.

2 EUROPEAN WAR. German troops entered French territory at Cirey. Russian troops crossed German border at Schnidden to the southeast of Biala. *N. Y. Times*, Aug. 3, 1914.

3 EUROPEAN WAR. German troops invaded Belgium. *Independent*, *79*:202.

4 EUROPEAN WAR. Germany formally declared war on France. Great Britain formally declared war on Germany. The United States announced its neutrality in the war between Germany and France and Russia, and between Austria and Servia.

5 EUROPEAN WAR. The United States issued a neutrality proclamation designed to cover wireless telegraphic communication. Text: *N. Y. Times*, Aug. 6, 1914.

The President of the United States tendered the good offices of the United States for the settlement of the war. The United States announced its neutrality in the war between Germany and Great Britain. *N. Y. Times*, Aug. 6, 1914.

6 EUROPEAN WAR. Austria declared war on Russia. *R. of R.* (N. Y.), *50*:292.

5 NICARAGUA—UNITED STATES. New Nicaraguan canal treaty signed. *R. of R.* (N. Y.), *50*:294.

7 EUROPEAN WAR. The United States announced its neutrality in the war between Austria and Russia.

8 EUROPEAN WAR. Portugal announced her intention to support Great Britain in the present war. *World's Work*, Sept., 1914, p. 136.

9 EUROPEAN WAR. Great Britain issued list of contraband of war.

9 EUROPEAN WAR. Servia declared war against Germany. *World's Work*, Sept., 1914, p. 136.

10 EUROPEAN WAR. Germany issued a list of contraband of war.

11 EUROPEAN WAR. The United States issued a statement dealing with the questions of neutrality, etc., raised by complaints to the Department of State. *Senate doc. No. 363, 63d Cong., 2d sess.*

August, 1914.

12 EUROPEAN WAR. Montenegro formally declared war on Germany. *R. of R.* (N. Y.), *50*:292.

13 EUROPEAN WAR. France declared war against Austria. Officially announced that a state of war existed between Great Britain and Austria since midnight. *R. of R.* (N. Y.), *50*:292.

13 UNITED STATES. The Senate advised and consented to the ratification of 18 peace treaties drawn upon the plan of the Secretary of State of the United States. The treaties were with Argentine Republic, Bolivia, Brazil, Chile, Costa Rica, Denmark, Guatemala, Honduras, Italy, Netherlands, Nicaragua, Norway, Persia, Portugal, Salvador, Switzerland, Uruguay and Venezuela. The treaties with the Dominican Republic and Panama were not acted upon. *Washington Post*, Aug. 14, 1914.

13 EUROPEAN WAR. Great Britain guaranteed the Bank of England against loss on discounts granted. The government also guaranteed the insurance of British cargoes. *Nation* (N. Y.), *99*:207.

14 NICARAGUA—UNITED STATES. Five hundred American marines landed at Bluefields, with the consent of Nicaragua to preserve order. *R. of R.* (N. Y.), *50*:294.

14 EUROPEAN WAR. The United States announced its neutrality in the war between France and Austria.

15 EUROPEAN WAR. Japan sent ultimatum to Germany demanding the evacuation of Kiau-Chau. Text: *N. Y. Times*, Aug. 17, 1914.

15 EUROPEAN WAR. Russia promised autonomy to Poland for loyalty of the Poles during the war. *R. of R.* (N. Y.), *50*:292; *Times*, Aug. 17, 1914.

15 EUROPEAN WAR. Announcement made that the United States government would look with disfavor on loans made by American bankers to any nations engaged in the European War. *N. Y. Times*, Aug. 16, 1914.

17 EUROPEAN WAR. England and Japan gave assurance of the limitation of fighting in the Far East. *Washington Post*, Aug. 18, 1914.

18 EUROPEAN WAR. The United States announced its neutrality in the war between Belgium and Germany.

18 EUROPEAN WAR. Russia promised a grant of civil rights to the Jews of Russia. *N. Y. Times*, Aug. 19, 1914.

August, 1914.

19 PERU—UNITED STATES. The United States Senate advised and consented to the ratification of the treaty with Peru drawn upon the peace plan of the Secretary of State of the United States. This is the nineteenth treaty of the kind approved by the Senate. *Washington Post*, Aug. 20, 1914.

20 Death of Pope Pius X. *Ind.*, *79*:298.

21 SALVADOR—UNITED STATES. Ratifications exchanged of the agreement of May 13, 1914, extending the duration of the arbitration treaty of December 21, 1908. English and Spanish texts: *U. S. Treaty Series*, No. 596.

23 EUROPEAN WAR. Japan formally declared war on Germany. *Washington Post*, Aug. 24, 1914.

24 EUROPEAN WAR. The United States announced its neutrality in the war between Germany and Japan.

25 EUROPEAN WAR. Austria declared war on Japan. A Zeppelin dropped bombs on Antwerp. *Washington Post*, Aug. 26, 1914.

27 EUROPEAN WAR. Japan declared a blockade of territory of Kiau-Chau. *N. Y. Times*, Aug. 28, 1914.

September, 1914.

1 EUROPEAN WAR. The United States announced its neutrality in the war between Austria and Belgium.

1 ST. PETERSBURG. Name changed to Petrograd.

2 EUROPEAN WAR. French Government removed from Paris to Bordeaux. *Washington Post*, Sept. 3, 1914.

2 EUROPEAN WAR. The President of the United States signed the act (Public No. 193), guaranteeing shipping against war risks. The bureau created by this Act was opened for business, September 28. List of contraband and conditional contraband, *N. Y. Times*, Sept. 29, 1914.

3 ALBANIA. Prince William of Wied left Albania. *N. Y. Times*, Sept. 4, 1914.

4 CARDINAL DELLA CHIESA, Archbishop of Bologna, elected Pope and reigns as Benedict XV.

4 EUROPEAN WAR. The Emperor of Germany sent message to the President of the United States protesting against atrocities of the allied troops. Text: *Washington Post*, Sept. 11, 1914. The reply

September, 1914.

of the President Sept. 16, 1914, *Washington Post*, Sept. 17, 1914.

5 EUROPEAN WAR. The allies agreed not to make peace separately. Text of agreement: *N. Y. Times*, Sept. 6, 1914.

7 EUROPEAN WAR. Russian Government announced the annexation of Galicia. *N. Y. Times*, Sept. 8, 1914.

9 EUROPEAN WAR. British and Germans reported fighting on Lake Nyassa in Africa. *N. Y. Times*, Sept. 10, 1914.

10 TURKEY. Turkey repudiated the capitulations. These capitulations are a series of conventions, treaties and privileges originating as early as the eleventh century whereby foreigners in the Ottoman Empire have been exempt from local jurisdiction in civil and criminal cases, and comprise all those rights of extraterritorial jurisdiction by which they were tried by their own judges, diplomatic representatives and consuls. The United States has protested against the abrogation and Italy has joined the Powers of the Triple Entente in a united protest. *Washington Post*, Sept. 11 and 17, 1914.

15 MEXICO—UNITED STATES. The President of the United States ordered the withdrawal of United States troops from Vera Cruz. *Washington Post*, Sept. 16, 1914.

15 UNITED STATES—FRANCE, GREAT BRITAIN, CHINA AND SPAIN. Treaties drawn upon the peace plan of the Secretary of State of the United States were signed by the United States with France, Great Britain, China and Spain. *Washington Post*, Sept. 16, 1914.

16 EUROPEAN WAR. Japanese forces reported to be moving against Kiau-Chau. China has been notified that Germany reserves the right to deal with the Chinese Republic as she sees fit because of the breach of neutrality in allowing Japanese troops to land on Chinese territory. *N. Y. Times*, Sept. 17, 1914.

17 EUROPEAN WAR. Belgian commission to the President presented a voluminous evidence bearing on the atrocities committed by the Germans in the present war. *N. Y. Times*, Sept. 17, 1914.

21 EUROPEAN WAR. United States issued statement showing status of armed merchant vessels. *Washington Post*, Sept. 21, 1914.

September, 1914.

28 EUROPEAN WAR. Great Britain gave notice that she would not recognize the article of the Declaration of London exempting conditional contraband of war from seizure when destined for neutral ports. The Declaration of London was adversely acted upon by the British Parliament. The articles of conditional contraband include foodstuffs, boots and shoes, forage and grain for animals, clothing, gold and silver coin, and bullion, paper money, vehicles, vessels, railway and telegraph materials, balloons and flying machines, fuel, powder and explosives, barbed wire, horseshoes, harness and saddlery, field glasses, chronometers and nautical instruments. *Washington Post*, Sept. 28, 1914.

INTERNATIONAL CONVENTIONS

ADHESIONS, RATIFICATIONS AND DENUNCIATIONS

COMMERCIAL STATISTICS BUREAU. Brussels, Dec. 31, 1913.
Ratifications:
Netherlands, June 20, 1914.
French and Dutch texts of convention: *Staatsblad, 1914*:258.

COPYRIGHT. Buenos Aires, August 8, 1910.
Ratifications:
United States, Dominican Republic, Guatemala, Honduras, Nicaragua, Ecuador and Panama.
French, English and Spanish texts of convention: *U. S. Treaty Series*, No. 593.

OPIUM. The Hague, January 23, 1912.
Ratifications:
Netherlands, June 20, 1914. *Staatsblad*, 1914, No. 257.
Venezuela, Sept. 20, 1913. *B. rel. ext.* (Venezuela), *4*:645.
French text of convention: *Staatsblad, 1914*, No. 257.

PATENTS, DESIGNS AND INDUSTRIAL MODELS. Buenos Aires, Aug. 20, 1910.
Ratifications:
Dominican Republic, Guatemala, Cuba, Honduras, Nicaragua, Ecuador, Panama, and the United States.
French and Spanish texts: *U. S. Treaty Series*, No. 595.

PECUNIARY CLAIMS. Buenos Aires, August 10, 1910.

Ratifications:

Dominican Republic, Guatemala, Honduras, Panama, Nicaragua, Ecuador, and the United States.

French, English and Spanish texts of convention: *U. S. Treaty Series*, No. 594.

POSTAL CONVENTION. Rome, May 26, 1906.

Adhesions:

China, from Sept. 1, 1914. *Monit.*, June 27, 1914.

Fiji Islands, from Oct. 1, 1914. *Monit.*, July 10, 1914.

RED CROSS. Geneva, July 6, 1906.

Ratifications:

Great Britain has cancelled the reservations made when ratifying the Geneva Convention. *Monit.*, Sept. 19, 1907, and July 25, 1914.

KATHRYN SELLERS.

GREAT BRITAIN [1]

Aerial navigation. Orders, May 25, 1914, under the Aerial Navigation Acts, 1911 and 1913. (Statutory Rules and Orders, 1914, Nos. 725 and 726.) 1½d.

Aeronautics. Technical report of Advisory Committee for 1912–13, with appendices. 10s. 5d.

Aliens Act, 1905. Return of alien passenger traffic to and from the United Kingdom, and number of expulsion orders made, during the three months ended March 31, 1914. (Cd. 7395.) 2d.

Aliens, Return showing names of, to whom certificates of naturalization have been issued during 1913. (H. of C. Repts. and Papers, Sess. 1914, No. 206.) 7d.

Arbitration convention between United Kingdom and United States signed at Washington, April 4, 1908, Agreement renewing for five years. Washington, May 31, 1913. (Treaty series, 1914, No. 6.) 2d.

British Nationality and Status of Aliens Bill. Report from standing committee with proceedings. (H. of C. Repts. and Papers, Sess. 1914, No. 251.) 1½d.

Chile, Translation of the proposed new customs tariff, showing present and proposed new rates of duty. (Cd. 7458.) 1s. 2½d.

China. Further correspondence respecting the affairs of China. [December, 1912, to October, 1913.] (Cd. 7356.) 9d.

Colombia. Translation of new customs tariff law, with comparison of new and former rates of duty. (Cd. 7353.) 7½d.

Commercial travellers' samples. Exchange of notes between United Kingdom and Greece recording an agreement relating to. Athens, April 3d, 1914. (Treaty series, 1914, No. 8.) 1d.

East India. Regulations and rules relating to the constitution of a legislative council for the Central Provinces and of certain amendments in the Imperial Council Regulations. (Cd. 7370.) 11d.

Egypt. Reports of H. M. Agent and Consul-General on the finances,

[1] Official publications of Great Britain and many of the British colonies may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., England.

administration and condition of Egypt and the Sudan in 1913. (Cd. 7358.) 9½d.

Extradition. Order in Council, May 14, 1914, directing that the Extradition Acts shall apply in the case of Germany in accordance with treaties of May 14, 1872 and May 5, 1884, as supplemented by convention of May 4, 1910, for the suppression of the white slave traffic. (Statutory Rules and Orders, 1914, No. 776.) 1½d.

Greek Nationality Law. Miscellaneous No. 4, 1914. (Cd. 7362.) 1d.

Guinea. Agreement between United Kingdom and France, respecting the delimitation of frontier between British and French possessions from Gulf of Guinea to Okpara River. London, February 18, 1914. (Treaty series, 1914, No. 5.) 9½d.

Muscat, Exchange of notes between H. M. Government and the Government of the French Republic respecting trade in arms and ammunition at. London, Feb. 4, 1914. (Treaty series, 1914, No. 9.) 1d.

Navy estimates for 1913–1914. Programme of ship-building, repairs, alterations, maintenance, &c. (H. of C. Repts. and Papers, Sess. 1914, No. 158.) 1d.

Treaties. Accessions to and withdrawals from treaties, etc., between the United Kingdom and foreign states. (Treaty series, 1914, No. 7.) 1d.

Wireless Telegraphy Research, Report of Committee on. (Cd. 7428.) 2d.

UNITED STATES [2]

American seamen in merchant marine, Report amending by substitute S. 136, to promote welfare of, to abolish arrest and imprisonment as penalty for desertion and to secure abrogation of treaty provisions in relation thereto, and to promote safety at sea. June 19, 1914. 31 p. (H. rp. 852, pt. 1.) Paper, 5c.

———. Hearings, 1914. 2 pts. iii+3–553 p. and iii+3–587 p. *Merchant Marine and Fisheries Committee.*

Arbitration treaties of 1908–1909, Agreements extending duration of: Italy, May 28, 1913. (Treaty series 588.) *State Dept.* Norway, June 16, 1913. (Treaty series 589.) *State Dept.* Switzerland, November 3, 1913.

[2] When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

(Treaty series 590.) *State Dept.* Spain, May 29, 1913. (Treaty series 586.) *State Dept.* Great Britain, May 31, 1913. (Treaty series 587.) *State Dept.* Japan, June 28, 1913. (Treaty series 591.) *State Dept.* Portugal, June 28, 1913. (Senate Ex. H, 63d Cong. 1st sess.) Sweden, June 28, 1913. (Treaty series 585.) *State Dept.* Paraguay, March 2, 1914. (Senate Ex. A, 63d Cong. 2d sess.) Costa Rica, March 16, 1914. (Senate Ex. C, 63d Cong. 2d sess.) Austria-Hungary, May 6, 1914. (Treaty series 592.) *State Dept.*

Canal Zone, Isthmus of Panama. Executive order to require ocean going vessels in Canal Zone to be fitted with wireless apparatus. July 9, 1914. 1 p. (No. 1988.) *State Dept.*

Chinese indemnity. Hearings on S. J. R. 33 to amend joint resolution for remission of portion of Chinese indemnity for losses and expenses incurred by reason of so-called Boxer disturbances during 1900, so as to provide for payment of expenses attendant upon defense of claims against the indemnity fund in Court of Claims. June 1, 1914. 41 p. *Foreign Relations Committee.*

Consular service, American. Article by J. J. Slechta. 7 p. (S. doc. 541.) Paper, 5c.

Consuls. Executive order amending regulations concerning invoices, etc., for merchandise. May 28, 1914. 5 p. (No. 1950.) *State Dept.*

Diplomatic and consular service. Executive order amending regulations concerning salaried officers and instructions. Apr. 30, 1914. 1 p. (No. 1926.) *State Dept.*

Expatriation. Report amending H. 1991, to amend act in reference to expatriation of citizens and their protection abroad (relating to women marrying foreigners). June 6, 1914. 4 p. (H. rp. 771.) *Foreign Affairs Committee.*

Extradition treaty between United States and Paraguay. Signed Asuncion, March 26, 1913. 6 p. (Treaty series 584.) *State Dept.*

Extraterritorial jurisdiction. Report favoring S. 2877, to amend act to carry into effect provisions of treaties between United States, China, Siam and other countries, giving certain judicial powers to ministers and consuls or other functionaries of United States in those countries, so as to require that ministers, consuls, or other functionaries invested with judicial authority shall be lawyers of experience and good standing. 1 p. (S. rp. 590.) *Foreign Relations Committee.*

Foreign Relations. Papers relating to, with annual message of President. Dec. 7, 1909. 1914. lxxi + 690 p. Cloth 55c; paper, 45c.

———. Same. (H. doc. 101, 61st Cong. 2d sess.)

Immigration, restriction of. Hearings on H. 6060, Dec. 11 and 12, 1913. ii+3–62 p. and ii+3–11 p. *Immigration and Naturalization Committee.*

Insular possessions. Public documents relating to noncontiguous territory except Alaska and Canal Zone, and two American occupations of Cuba, for sale by Superintendent of Documents. July, 1914. 46+[2] p. (Price list 32, 3d ed.) *Government Printing Office.*

International Conference on Social Insurance. Communication submitting invitation from French Republic to United States to send delegates to, to be held in Paris in September, 1914. July 27, 1914. 8 p. (H. doc. 1132.) *State Dept.*

International Congress of Americanists. Senate Joint Resolution No. 97, authorizing President to extend invitations to foreign governments to participate in, at Washington, October, 1914. May 9. 1 p. (Pub. No. 28.) *State Dept.*

International Congress of Chambers of Commerce, Sixth. House Joint Resolution No. 264, authorizing President to accept invitation of France to participate in, to be held at Paris, June 8–10, 1914. May 28, 1914. (Pub. No. 31.) *State Dept.*

International Congress on Education, Third. Report favoring H. J. R. 273 requesting President to invite foreign governments to participate in, to be held at Oakland, Cal., August 16–27, 1915. June 13, 1914. 2 p. (H. rp. 825.) *Foreign Affairs Committee.*

International Congress on Home Education, Fourth. S. J. R. 157 requesting President to invite foreign governments to participate in, to be held at Philadelphia, Pa., September 22–29, 1914. July 17, 1914. (Pub. No. 37.) *State Dept.*

International Congress on Home Education. Report favoring H. 11179, authorizing Secretary of State to extend invitation to foreign countries to send delegates to, at Philadelphia, Pa., Sept. 22–29, 1914. May 5, 1914. 2 p. (H. rp. 620.) *Foreign Affairs Committee.*

International Congress of Musical Science and History. Message transmitting invitation to participate in, to be held in Paris, June, 1914. May 16, 1914. 3 p. (H. doc. 978.) *State Dept.*

International Congress on Neurology, Psychiatry and Psychology, Message transmitting invitation to United States Government to participate in, to be held at Berne, Switzerland, Sept. 7–12, 1914. May 26, 1914. 4 p. (H. doc. 997.) *State Dept.*

International Congress of World's Purity Federation, Ninth. Report amending H. J. R. 271 authorizing President to appoint delegates to attend, to be held in San Francisco, Cal., July 18–24, 1915. June 13, 1914. 2 p. (H. rp. 826.) *Foreign Affairs Committee.*

International Dental Congress, Sixth. Message transmitting invitation to United States Government to participate in, to be held at London, Aug. 3–8, 1914. May 26, 1914. 3 p. (H. doc. 998.) *State Dept.*

———. S. J. R. 105 authorizing President to extend invitation. July 13, 1914. (Pub. No. 35.) *State Dept.*

International Dry-Farming Congress. H. J. R. 255 authorizing President to extend invitations to other nations to send representatives to, to be held at Wichita, Kans., Oct. 7–17, 1914. July 17, 1914. (Pub. No. 38.) *State Dept.*

Malambo fire claims. Report favoring H. 12060, to pay amount awarded to claimants by joint commission under treaty of November 18, 1903, between the United States and Panama. June 4, 1914. 3 p. (H. rp. 764.)

Military policy of United States during Mexican War (1845–48); by Emory Upton. 1914. ii + 195—122 p. (H. doc. 972.) Paper, 5c.

National Star-Spangled Banner Centennial Celebration, Baltimore, Md., Sept. 6–15, 1914. Report favoring S. J. R. 148, authorizing President to extend invitations to foreign governments to participate in. 1 p. (S. rp. 578.) *Foreign Relations Committee.*

Niagara River, Diversion of waters of. Hearings on bills: Jan. 16, 1914, p. 1–23; letter of Secretary of War, 6 p.; July 15, 1914, 15 p.; July 15, 1914, trace of title to Seneca Indians, 38 p. *Foreign Affairs Committee.*

———. Report amending H. 16542 for control and regulation of waters of. July 20, 1914. 24 p. (H. rp. 990.) Paper, 5c.

Opium convention signed at The Hague, January 23, 1912 (and final protocol of 2d International Opium Conference signed at The Hague, July 9, 1913). 12 p. (Senate Ex. I, 63d Cong. 1st sess.)

Panama Canal. Addendum to supplement 2 of Executive orders relating to. [March 4, 1913–April 16, 1914.] *War Dept.*

———. Diplomatic history of, correspondence relating to negotiation and application of certain treaties on subject of construction of interoceanic canal, and accompanying papers. 1914. xii + 602 p. (S. doc. 474.) Paper, 40c.

———. Effect of, on sea traffic. By R. L. Dunn. 12 p. (S. doc. 540.) Paper, 5c.

———. Executive order creating committee to formally and officially open. May 20, 1914. 2 p. (No. 1944.) *State Dept.*

Panama Canal Act. H. 14385 to amend, so as to repeal that part which exempts vessels engaged in coastwise trade of United States from tolls. Approved June 15, 1914. 1 p. (Pub. No. 113.) *State Dept.*

———. Hearings on H. 14385 to amend act so as to repeal that part which exempts vessels engaged in coastwise trade of United States from payment of tolls. 1914. 1024 p. 3 tab. *Interoceanic Canals Committee.*

———. Report amending H. 14385. Apr. 30, 1914. 1 p. (S. rp. 469.)

———. Index of proceedings and debates in House of Representatives and in Senate, March 5–May 15, 1914, on H. 14385 to amend act so as to repeal that part which exempts vessels engaged in coastwise trade of United States from tolls. 1914. 11 p. *Senate.*

———. Report amending S. R. 376, requesting President to open diplomatic negotiations with Great Britain for appointment of international tribunal to determine differences with regard to right of United States to discriminate in favor of ships of commerce of its citizens in matter of payment of tolls for use of Panama Canal. June 3, 1914. 1 p. (S. rp. 581.) *Foreign Relations Committee.*

Parcel post convention between United States and Liberia, signed Monrovia, April 30, 1914. 9 p. *Post Office Dept.*

Radiotelegraphy. Report of committee on wireless telegraphy research appointed by Postmaster General of Great Britain. June 30, 1914. 14 p. (S. doc. 528.) Paper, 5c.

Safety of Life at Sea. Analysis and explanatory notes of London convention, in relation to American merchant marine. By Andrew Furuseth. May 1, 1914. 16 p. (S. doc. 476.) Paper, 5c.

———. Authenticated copy of international convention relating to, detailed regulations thereunder, final protocol, and *voeux* expressed by conference; signed London, Jan. 20, 1914. 67 p. 1 pl. (Senate Ex. B, 63d Cong. 2d sess.)

Seal and seal fisheries. Hearings on investigation of fur-seal industry of Alaska. 1914. 849 p. il. 5 maps. 1 tab. *Expenditures in Commerce Dept. Committee.*

———. Views of minority. July 27, 1914. 22 p. (H. rp. 500, pt. 2.) Paper, 5c.

Treaty-making power under the Constitution. By Henry St. George Tucker. 11 p. (S. doc. 539.) Paper, 5c.

GEO. A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

DUTCH STATE SERVITUDE IN PRUSSIA [1]

Supreme Court of Cologne, VII Civil Division. April 21, 1914 (7. U. 106–12).

Aix-la-Chapelle–Maastricht Railroad Company *AG.*, defendant and plaintiff on appeal, *v.*: (1) Thewis, plaintiff and defendant on appeal, and (2) Royal Dutch Government, intervener.

Facts of the Case

The plaintiff is the owner of a number of houses situated at Naustrass near Herzogenrath, on Wendelin Street. He declares that these houses have been damaged and depreciated by reason of the *dominial* or government mine worked by the defendant. In virtue of § 148 of the General Mining Law, he therefore demands compensation from the defendant for damage sustained and moves:

To condemn the defendant to make full compensation for the damage and depreciation caused to his two houses as a result of his mining operations:

To have this damage appraised by experts, and to condemn the defendant to pay to him the amount to be determined, which should not be less than M. 2000.

The defendant has moved to dismiss the suit.

By an interlocutory judgment of the Court of First Instance of Aix-la-Chapelle, May 10, 1911, whose contents are taken into consideration, the exception pleaded by the defendant on the ground of non-suability was denied.

By the final judgment of the aforesaid court, May 14, 1912, the defendant was condemned to pay M. 2050 to the plaintiff.

Against this judgment, whose contents are also taken into consideration, the defendant has lodged an appeal and moved to dismiss the action on condition that the disputed judgment be modified.

[1] Reprinted from the *Zeitschrift für Völkerrecht*, No. 4–5, (July), 1914.

The plaintiff has moved to dismiss the appeal.

He has given notice of the action to the Royal Dutch Government, and to the Aix-la-Chapelle–Maastricht Railroad Company of Maastricht.

The former only has joined in the legal action, espoused the cause of the plaintiff, and moved to decree according to the plea of the plaintiff.

In justification of the appeal lodged by the defendant, the latter has renewed his allegation made before the Court of First Instance, namely, the exception on the ground of non-suability, and answered according to his pleas of June 24, 1913 (Bl. 109 ff.) and December 1, 1913 (Bl. 129 ff.).

In justification of their motions, the plaintiff and the intervener have submitted their pleas of October 3, 1913 (Bl. 120 d. a.), of October 15, 1913 (Bl. 122 ff.) and of March 23, 1914 (Bl. 145).

It seems proper, in the first place, to decree, as was decreed, by an interlocutory judgment, in accordance with § 303 of the Code of Civil Procedure.

The Court of First Instance takes the ground that the claim of the plaintiff is justified by § 48 of the General Mining Law of June 24, 1895, of the Prussian States. But this does not square with the facts. The Prussian Law is not at all applicable to this case. The *dominial* or government mine in question and located at Kirchrath had, as a result of the mining royalty prevailing in that region before the French mining law of July 28, 1791, become a fiscal mine, and in the course of time came as such in the possession of the Dutch State (cf. Brassert, *Zeitschrift für Bergrecht*, Vol. 16, p. 144 ff., especially Bl. 465 ff.). The legal relations of this mine were determined in the Prusso-Netherlandish boundary treaty of June 26, 1816, which endeavored mainly (see, preamble thereto), to fix definitely the boundaries between the two neighboring states, and to remove the difficulties that had arisen in regard to the sovereignty over certain districts. In consequence, and in accordance with Art. 18, "that part of Kerkrade, situated to the right of the Aix-la-Chapelle highway, and the entire part of the Rolduc community, situated on the left bank of the Wurm" were ceded to Prussia. Art. 19 then further provides:

> The cession of the Kerkrade and Rolduc parts resulting from the preceding article shall cause no damage or disadvantage to the exploitation of the coal mine. Formerly, this mine belonged to the Abbey of Rolduc and in the Kerkrade and Rolduc districts it is *now* being *continued* for the account of the Dutch Government, in such manner,

that this government or, in its place, the lawful owner, retains the authority to carry on in the ceded parts works serviceable for the mining of coal or for drainage purposes. Neither under the pretext of instructions issued to its engineers, nor by imposts or other burdens, may the Government of Prussia interfere with or restrict the mining of coal or the bringing of the coal mined to the surface, nor may it place any hindrance in the way of its being marketed.

Nor may the Government of Prussia grant private commissions (this should read *private concessions—cf.*, Brassert, *Zeitschrift für Bergrecht*, Vol. 14, p. 268) in the said ceded parts. Existing private concessions are restricted to the limits assigned to them by the act of session or by the laws under which they were granted.

The opinion of the judge of the lower court, to the effect that the aforesaid authority of the Dutch Government must be regarded as a mining concession, transferred to the defendant, does not meet the present case. The plea entered by the intervener that, in conformity with all the circumstances, the boundary treaty between Prussia and The Netherlands is in the nature of an agreement coming within the sphere of international law, by which the territorial sovereignty of the two neighboring states was mutually defined, must be accepted. Parts of the districts of Kerkrade and Rolduc go to Prussia, but the Dutch Government *retains* the *right* to carry on mining in the ceded parts. This means, as the intervener correctly states, not what might be termed a mining concession of the Dutch Government granted by Prussia according to civil law, but the exclusion of certain sovereign rights in the ceded parts resulting from the territorial sovereignty. In so far as the right to mine coal and other minerals contained in this coal-field comes into question, part of this territorial sovereignty remains with Holland. Because of this fact, a sort of international servitude has arisen by which Holland is as a state, entitled, now as previously, in the matter of this mine, to exercise its own legislative authority and police supervision; that is, it has real sovereign rights with respect to the object situated within the territory of the foreign state (see Ullman, *Völkerrecht*, pp. 320 ff.).

This fact is established, first of all, by the boundary treaty itself, as well as by the actual administration in the premises. The *dominial* mine comes under the administration of the Dutch mining authorities. The Prussian chief mining office has never claimed any right of supervision, and precisely in consideration of the aforesaid Art. 19 of the boundary treaty, and under the sanction of the Prussian Minister of Commerce in the latter's decision upon the appeal, and in harmony with the Prussian ministerial decision of March 24, 1875 (see, Brassert, *Zeitschrift für*

Bergrecht, Vol. 14, pp. 267–269), this same office has rejected, as being inadmissible, all requests for concessions by third parties to other minerals within the territory of this coal-field, reserved to the Dutch Government.

Accordingly, the *dominial* mine is not subject to Prussian legislation, but to the laws of the Netherlands, and it is for these reasons that § 148 of the General Mining Law is not applicable to this case. That the houses of the plaintiff are situated on Prussian land is immaterial. For, according to the principles of international private law, the responsibility for damage such as is here claimed to have been sustained, is fixed by the law of the locality in which the mining is being carried on, and not by the laws of the locality where the damage arises (see, Brassert, *Z. f. B.*, Vol. 30, p. 371).

In the Netherlands, the French mining law of April 21, 1810, is now in force. According to Art. 15, the mining grantee must there furnish bond for the full compensation of any, even accidental damage. This has led to the principle that the concessionaire is responsible for any, even accidental surface damage. Regarding this point, there is neither in theory nor in practice the slightest doubt as to the applicability of the mining law of April 21, 1810 (see, Brassert, *Z. f. B.*, Vol. 8, p. 521 and Vol. 4 at bottom of page 331).

The question therefore arises: Is the defendant, according to the principles of this French law, responsible in his capacity as a concessionaire?

Our argument must be based on the fact, that the Dutch State is the owner of the *dominial* mine, not in virtue of a concession granted to it, but in virtue of a public court decision, as pointed out hereinbefore. After the Dutch Government had worked this mine as a fiscal entity for more than thirty years, it conveyed by the law of June 19, 1845 and by the contract of June 4–8, 1846, the administration and usufruct of the aforesaid *dominial* mine at Kirchrath to the Aix-la-Chapelle-Maastricht Railroad Company, domiciled at Maastricht, for a period of ninety-nine years. It is true that this contract was entered into exclusively with the company domiciled in Maastricht. But, taking all the circumstances of the case into consideration, the defendant who has his headquarters now in Aix-la-Chapelle, can adduce nothing in his favor from this fact. From the statutes submitted in the premises, it appears clearly that in 1846, the two named joint stock companies were organized simultaneously, with their headquarters respectively in Aix-la-

Chapelle and in Maastricht. The object of the two companies related to a partnership, referred to in detail in one of the statutes, with reference to a railroad, which is likewise specified in detail in the said statute, and for the purpose of constructing and exploiting the same in connection with the coal-mine of the *dominial* mine at Kirchrath, and furthermore, to take over the administration and exploitation of the coal-mine situated in the Wurm district and belonging to the Royal Dutch Government. According to the statutes, the defendant assigned an interest to the joint stock company domiciled in Maastricht and by mutual agreement the two managed their business in common. It was declared that the defendant joint stock company should dissolve whenever the joint stock company domiciled in Maastricht should have to disorganize. The board of directors of the defendant joint stock company, to whom was committed the management of affairs, consists of one or two persons. This board, according to the statutes, acts for both companies and has its domicile either at the *dominial* mine at Kirchrath, or in Aix-la-Chapelle or in Maastricht; at all events, the board must at least have its elected domicile in Holland. The capital of both companies is used jointly for the same purpose, so that each share of both companies has the same value in the common enterprise, and each of the two companies participates in the advantages and in the disadvantages of the other company.

It is possible, as stated by the defendant, that the *dominial* mine does not belong to the "coal-mine situated in the Wurm district." But it is a fact, that in accordance with the statutes, the present common board for both joint stock companies is composed of Wilhelm Hussmann, mine director, and Wilhelm Rütgers, mine inspector, and that both are domiciled in Kirchrath. According to matters as they stand, it is however also the main business of this board to direct and carry on the work of the *dominial* mine at Kirchrath. From all of which the assumption is justified that the *dominial* mine is being managed in common by the two joint stock companies, and that each of them is also interested in this mine. For any damage occasioned in consequence of the exploitation of this mine, each of the two companies may be proceeded against as a joint debtor (§ 17, Code of Civil Procedure), provided however that the conditions therefor are established.

That the defendant entertained this view formerly, results clearly from the fact that he has at all times promptly made good all damage occasioned, and in the course of the trial in the lower court (1. 0. 360–05)

has always claimed that not he, but solely the company domiciled in Maastricht, had managed the mine and was in consequence responsible for these damages.

The opinion of the judge in the first instance that, according to Art. 15 of the law of April 21, 1810, the defendant, although not responsible for the damage caused to the houses of the plaintiff, was yet responsible because the Dutch State had by contract of April 4–8, 1846 made over the mine to the defendant as concessionaire, is not in point. He reaches this conclusion from the meaning and from the text of the contract. But these views cannot be accepted. That the contract of April 4–8, 1846 was preceded by a law and that this contract was subsequently approved by law, is in no way decisive. This was in accord with the financial authority of the king of the time. The expression, that the granting of a "concession" is intended, does indeed occur in the law; but the term "concession" with regard to the *dominial* mine nowhere occurs, while the future concessionaires of the railroad are repeatedly referred to. But, concession nowhere appears in the contract itself. On the other hand, the text of the provisions of the contract in no way show that the granting of a concession in the mine was intended. Nor does it appear that the provisions of Art. 5 ff. of the mining law of April 21, 1810 with regard to the granting of a concession have been complied with. For a long time, the Dutch State had been the owner of the mine and had exploited the same for many years. There is nothing to prove that the state intended to alienate its ownership in the mine, for ninety-nine years. The period of ninety-nine years clearly indicates that a straight deed of conveyance was intended. The transfer of the ownership in the mine by "concession" could be effected, according to the statutable provision of the law of April 21, 1810, not for a certain period, but only as an irrevocable hereditable property to be freely disposed of as the owner might deem fit (Art. 7). That the matter concerned a straight deed of conveyance is indicated by the remaining provisions of the contract, where it is expressly stated "the administration and exploitation would be transferred" and further, "after ninety-nine years, the state will again take possession of the aforesaid mine." The compensation to be paid in accordance with Art. 12 of the convention is simply the rent. The judge of the first instance is correct in holding that for the cession of the mining property, a compensation given but once should also be paid. He finds that this lump sum amounts to 500,000 guilders, which was to be paid according to Art. 1. This secur-

ity has however been given only, as per the statutes, as a guarantee for the construction of the railroad from Aix-la-Chapelle to Maastricht.

In accordance with Art. 7 of the contract *this security* was long ago, after the completion of the construction of the railroad, returned to the defendant; in place of this security, an equivalent has not been furnished; a consideration payable but once for the alleged infraction of the mining property does not therefore appear in the premises.

Since, under the circumstances, the defendant may not be regarded as a concessionaire, but as a leaseholder pure and simple, he is responsible for the damage caused to the houses of the plaintiff by reason of the exploitation of the *dominial* mine (though not the immediate damager himself), not on the ground of the mining law of April 21, 1810, but on the ground of the general provisions of Art. 133ff. of the Civil Code for guilty damage to foreign property.

IN THE MATTER OF THE ARBITRATION OF THE BOUNDARY DISPUTE BETWEEN THE REPUBLICS OF COSTA RICA AND PANAMA PROVIDED FOR BY THE CONVENTION BETWEEN COSTA RICA AND PANAMA OF MARCH 17, 1910.

OPINION AND DECISION OF EDWARD DOUGLASS WHITE, CHIEF JUSTICE OF THE UNITED STATES, ACTING IN THE CAPACITY OF ARBITRATOR AS PROVIDED IN THE TREATY AFORESAID.

Washington, September 12, 1914.

Before proceeding to a consideration of the subject for decision, to avoid breaking continuity of statement, it is observed that a motion made by one of the parties to strike out certain documents because not filed in duplicate, and a motion by the other party to eliminate certain papers because they are said to be partial and hence unauthorized, have both been considered and found irrelevant to the determination of the case and the motions are therefore overruled without further statement on the subject.

Moreover, at the threshold I say that when the duty of considering this case as provided in the treaty was undertaken, it was understood that all the documents and papers in the Spanish language would be translated by the parties into English, and therefore such documents will be referred to in the translations which the parties have furnished.

To state at the outset, first, the geographical situation of the two countries, parties to this arbitration, and, second, to give the history of the nature, origin, development and undisputed facts of the controversy, will conduce to a clearer appreciation of the matters to be passed upon. In doing so for the purposes of the rights with which this arbitration is concerned, Costa Rica will be taken as representing not only rights enjoyed by it in its own name, but all those concerning the matter here in dispute which it possesses as the successor of a prior government, the Republic of Central America; and Panama will likewise be taken as representing for the same purposes, not only its own rights, but also those of its governmental ancestors, the Republic of Colombia, the Republic of New Granada, the United States of Colombia and the Republic of Colombia.

First. The two countries have an extended coast line on the Atlantic and the Pacific Oceans, the territory between the oceans being divided by the main range of the Cordilleras. Not taking into account any conflict as to boundary, if any there be, between Panama and the Republic of Colombia lying southeast of Panama, the territory of Costa Rica and Panama on the Atlantic extends from the upper boundary of Costa Rica at about the eleventh parallel of latitude in a southeasterly direction down to about 8° 40′, a distance not considering the sinuosities of the coast approximating 450 miles.

Second. For seventy-five or eighty years there were controversies between Panama and Costa Rica or their predecessors concerning the extent of their territorial authority. All the disputes referred to arose from two subjects differing fundamentally; the one, a contention on the part of Panama that its territorial sovereignty embraced the entire Atlantic coast, not only along its own front, but also along the front of Costa Rica and Nicaragua, which country lies above Costa Rica, since the claim of sovereignty terminated only at Cape Gracias á Dios, which was practically the uppermost boundary of Nicaragua dividing that country from Honduras. This claim was based upon what was asserted to be the operation of a Spanish Royal Order of 1803. The other claim, distinct from the former because resting upon independent considerations and which would require to be disposed of even if the former claim was held to be unfounded, concerned the boundary dividing the territory of the two countries in the expanse from the Atlantic to the Cordilleras, across the same and on the Pacific side. So far as the entire territorial claim is concerned and the points in the mere boundary claim which con-

cern the crossing of the Cordilleras and the line of boundary on the Pacific side, no further statement need be made for reasons hereafter to be set forth. The aspect of the controversy therefore necessary to be stated here involves only the boundary between the two countries in the territory situated on the Atlantic side between that ocean and the range of the Cordilleras.

On the part of Costa Rica in substance from the beginning its lower boundary was claimed to embrace an island in the Atlantic Ocean designated as Escudo de Veragua opposite the mouth of a river named as the Chiriquí, which emptied into the Atlantic shortly below what was known as Almirante Bay, and following the course of that river to the Cordilleras. This claim of boundary, if valid, would necessarily have deprived Panama or its predecessors of a large area of territory over which that country asserted jurisdiction. This assertion of boundary right made by Costa Rica was based, besides a reference to other Spanish documents or decrees, especially on what was asserted to be the result of certain Spanish Cedulas or Capitulacions of 1540, 1573 and 1600. Again for reasons which will hereafter be made apparent, the facts concerning the rightfulness of this claim of boundary on the part of Costa Rica need not be further enumerated.

On the other hand, the claim on the part of Panama or its predecessors was that the boundary line was made by a river which took its source in the Cordilleras and flowed into the Atlantic at a point much above Almirante Bay. The river which it was thus contended by Panama constituted the boundary was designated by various names and the point at which it emptied into the Atlantic would seem for a considerable time to have been in doubt. There is no ground, however, for real dispute that it came finally to pass that Panama recognized that the stream which it relied upon and continued to insist constituted the boundary along its entire course from the mountains debouched in the Atlantic Ocean shortly below a point indifferently designated as Punta Carreta or Punta Mona—indeed that such river was the first stream emptying into the Atlantic below that point—and that at its mouth at least the stream in question was known as the Sixaola. The boundary dispute therefore involved the territory lying between the two rivers contended for in their courses as they flowed from the mountain range in which directly or indirectly they took their sources to the ocean, and the area, and extent of the controversy, therefore, depended in the nature of things upon the direction of the flow of the bounding rivers which the parties had in

mind and upon which they respectively relied as constituting the division between the two countries.

As the statement just made in a general way points to the questions of fact and law to be passed upon, it might well be taken as adequate for the purposes of the mere outline which I at the outset indicated, and therefore would render it necessary now to make no further statement before coming to an analysis of the questions of law and fact for decision under the present arbitration.

But as when the discharge of that duty is reached it will become apparent that in its last analysis every issue for decision will involve an appreciation of the facts concerning the claim of river boundary relied upon by Panama, the assertion of the river boundary contended for by Costa Rica being, as I have said, out of the case, in order to avoid repetition and to clear a broad way leading to the merits, I propose to state the facts concerning the essential matters which require to be considered, concerning the claim of Panama under a third heading as follows:

Third. The origin of the claim made by Panama, the acts, dealings and admissions of that Government or its predecessors concerning such claim, the negotiations for a prior arbitration, the environment of such negotiations, the treaties made agreeing to the same, the award, the course taken by the parties in executing it, the controversy which resulted, either concerning its interpretation or its binding force, the entering into the arbitration treaty now being executed, and such additional facts as are found in this record as may be considered necessary to be taken into view in connection with the questions of law which require to be passed upon.

To the end of orderly consideration I state the subjects which this general proposition embraces separately under four headings enumerated (a), (b), (c) and (d).

(a) *The source of the boundary claim of Panama and Panama's official assertions of its right by way of negotiations or attempts to negotiate with Costa Rica with reference to the same or otherwise.*

There is no document in the record upon which the assertion by Panama or its predecessors to the river boundary above referred to can be said to rest as an original muniment of title, and therefore the nonexistence of any document of that character may be assumed. I say this because although Señor Madrid, a Colombian publicist, in 1852 in a report made to the Colombian Minister of Foreign Affairs declared that

official documents to such effect existed, Señor Borda, another Colombian publicist, as late as 1896 in a work prepared officially for the use of the Colombian Government declared that no such official documents had been found and could not be said to exist unless they were considered to be embraced by two alleged maps which were referred to.

But without reference to the source of the title, the existence of the dispute as to boundary at an early date is clearly shown, since in 1825 Costa Rica as a state of the United Provinces of Central America in its Constitution declared its boundary to be the Escudo de Veragua, the island opposite the Chiriquí River which, as I have said, is the boundary now relied upon by Costa Rica. And in the same year, presumably as the result of a dispute concerning this boundary, the Republic of Colombia (Panama) and the United Provinces of Central America (Costa Rica) entered into a convention by which they obliged themselves "to respect the limits of each other as they now exist," and expressed their purpose to fix their boundaries upon that basis and contemplated a future agreement or convention to give effect to that purpose. The provisions thus referred to were embraced in Articles VII and VIII of the convention. There was no express agreement between the parties for the settlement or demarcation of the territorial claim as to sovereignty over the coast up to Cape Gracias á Dios, although Article IX of the convention contained a provision for a *modus vivendi* between the parties concerning such claim.

Clear as is the text of the treaty in question on the two distinct subjects stated, if there were room for obscurity it would be greatly illumined by a consideration of the negotiations which preceded the adoption of the treaty. I say this because in those negotiations a proposition on the part of Colombia (Panama) to adjust or compromise the larger territorial claim on a basis stated was promptly rejected by Costa Rica, and on the other hand a proposition made by the representative of Colombia that "as to boundaries it is necessary to hold to the *uti possidetis* of 1810 or 1820 as may be desired," was promptly accepted by Costa Rica, thus indicating why as to the larger claim nothing but a provision for a *modus vivendi* was inserted, while as to the boundary claim proper a basis for its adjustment was agreed upon and a declaration of the purpose to execute in the future that agreement was made. What exactly was the possessory boundary relied upon as then existing does not appear. Subsequently, the contemplated purpose of delimiting the boundary stated in the convention not having been carried out, that is in 1836, the Republic of New

Granada (Panama), in establishing a new territory called Bocas del Toro fixed the limits of that territory on the Atlantic coast from the river called Concepcion up to the mouth of a river described as the Culebras and then "on the northwest [that is, from the mountains to the mouth of the Culebras] by the frontier line which separates on that side the Republic of New Granada from that of Central America." It is apparent that this description, while it amounted to an attempt to definitely fix a line of boundary on the Atlantic coast at the entrance of the Culebras River, did not define the line of that boundary from the point of the mouth of that river to the main Cordilleras, but left it to follow the course of the existing boundary line between the two countries—an omission which was presumably caused by the fact that by Articles VII and VIII of the convention of 1825, as we have seen, the line of such boundary was to be determined by the application of the doctrine of *uti possidetis* and the subsequent demarcation which was contemplated but which had not taken place. It is to be observed, however, that while the line from the mouth of the river to the mountains was thus left open to be marked, the provision clearly points out that the line of boundary or frontier as it then existed and as it was understood between the parties, considered in its trend from the mountains to the mouth of the river, ran in a northeasterly direction, or, conversely, from the mouth of the selected river to the mountains, in a southwesterly course.

Following the assertions of right on behalf of Costa Rica to the southern boundary at the Chiriquí River, as at the outset stated, and of Panama to a northern boundary at the mouth of the river called the Culebras, running from the mountains to the ocean on a line having the course above indicated, many subsequent negotiations occurred which we outline briefly as follows:

In 1856 a treaty was drawn between New Granada (Panama) and Costa Rica, by which the northern boundary between the two countries on the Atlantic was fixed by a river named the Doraces from its source in the Cordilleras "down-stream by the middle of the principal channel of this river until it empties into the Atlantic." When the Congress of New Granada (Panama) came to act upon this treaty it defined the mouth of this river in the Atlantic as being "the first river which is found at a short distance to the southeast of Punta Carreta [Punta Mona]." As a result of this definition the treaty was not ratified because Costa Rica declined to agree to the definition, which, of course, if accepted,

would have destroyed its claim to a boundary by the Chiriquí, whose point of emptying into the Atlantic was many miles below Punta Carreta. And this serves to demonstrate that the real difference between the parties, at least as to the boundary on the Atlantic side, did not arise from the fact that the parties were quarreling over the direction of either of the different bounding rivers upon which they respectively relied, but were disputing and unalterably at odds as to which river was the boundary.

Again in 1865 a further attempt by treaty was made to fix a boundary by a river described as the Carnaveral, which if made the boundary would in substance, that is, for all practical purposes, have created a boundary the equivalent of that claimed by Costa Rica in the Chiriquí River. The treaty failed of ratification, and without going into detail it is true here again to say that the failure of the ratification in part at least arose from the impossibility of securing a meeting of minds of the two countries as to the abandonment of the claims of the river boundary pressed by either side, and was not concerned with the contention upon one side or the other concerning the course or direction of the bounding river which either claimed, if that river had been accepted as the boundary.

In 1873 another treaty was drawn which defined the boundary by a river called the Bananos flowing from its source in the Cordilleras emptying in the Atlantic at Almirante Bay. As the concession of the boundary by this river would have clearly repudiated Panama's claim previously asserted of a river emptying into the Atlantic, the first below Punta Carreta or Punta Mona, its ratification would have destroyed all right of Panama to such claim. But the treaty was not ratified, thus again affording an illustration of what was the real dispute, that is, which of the rivers was the boundary, and the difficulty of securing the ratification of any treaty on that subject.

In the long period of time embracing the acts to which I have just referred there were various official statements of responsible officers of the Colombia (Panama) Government, all resting its boundary claim upon a river boundary, and not one word of intimation is found in the slightest degree tending to show that any other or different boundary right was claimed than one by a river, whatever may have been the controversies or doubts suggested concerning the particular name of the river or the point where it emptied into the Atlantic, and, indeed, this also is true concerning the general course and trend of the bounding river relied upon. I make these statements, not overlooking the fact that there are

instances where Punta Mona, a place on the Atlantic shore not on the mouth of any river, is mentioned as the boundary and indeed one instance where it was declared that Humboldt was authority for that proposition, although the very official making the statement pointed out that the boundary was the Culebras River which, as then understood, was a stream entering the ocean below Punta Mona. Likewise, Madrid, the distinguished Colombian publicist already referred to, making a report to the Colombian Senate said in referring to the boundary on the Pacific as well as on the Atlantic and of the crossing of the boundary line over the Cordillera range, that the whole boundary line, both on the Pacific and the Atlantic sides, including the crossing of the mountains, consisted of a line to be drawn from the middle of the Gulf of Dulce on the Pacific side, thence crossing the Cordilleras and traversing the Atlantic side to "the mouth of the River Doraces or Culebras, a short distance from Punta Carreta, which is also, approximately, the boundary indicated by Baron de Humboldt and other celebrated travellers," thus in effect confirming a river boundary as asserted from the beginning and at all times without hesitation or deviation by Panama, and in addition making it quite clear that the course and direction of the bounding river as understood between the parties was that which has been previously stated.

(b) *The light thrown upon the subject, if any, by a consideration of maps and charts applicable to the claim.*

It is undoubted that in the earlier maps there was great uncertainty as to the particular name of the river relied upon, some showing a river named Dorces, Doraces or Dorados, some a river called Culebras, and some showing two distinct rivers one named Dorces, Doraces or Dorados and the other Culebras. However, it is true to say that in a general sense all the rivers so named are shown on all these maps to have a general northeasterly direction from the main Cordilleras where, or in the vicinage of which, they purported to take their source and flowed to the Atlantic Ocean, whatever was the confusion in the respective maps as to the precise point of location of the rivers or the place where they emptied into the Atlantic. For instance, what is known as the Spherical Chart of 1805–9 shows the Dorados river flowing from the region of the mountains in a northeastern direction without tributaries to its mouth in the Atlantic, the first below Punta Mona, while the map of Ponce de Leon and Paz of 1864 showed the Culebras or Dorados having the same

general course emptying into the Atlantic above Punta Mona. But none of these differences serve to confuse the situation when looked at comprehensively, that is, they do not serve to create any material doubt concerning the boundary river, the first below Punta Mona, relied upon by Panama and the general northeasterly course which such river was considered to have from the point of view of its source in the mountains and journeying from thence to the place where it emptied into the ocean.

And indeed it is here again worthy of remark that this coincidence of course corresponds in its general trend with the assertion by Colombia (Panama) of its boundary line in the very first instance where it found exact expression in the definition of the boundary in the act creating the territory of Bocas del Toro, to which I have referred.

(c) *The demonstration as to the exact nature of the claim afforded by the occupation or settlement of the territory covered by the boundary during the period of dispute.*

It is, moreover, to be observed that it is obvious if the parties contemplated the boundary to be a river flowing from the mountains to the ocean in a northeasterly course, the eastern bank of such a river would belong to Colombia (Panama) and the western bank to Costa Rica, an understanding which it is undoubted was the one entertained by the two Governments. I say this because the proof here is adequate and comprehensive that the western bank of a river so flowing was occupied and settled under the jurisdiction of Costa Rica, and that as far as settlements were made by Colombia (Panama) the eastern bank was taken as the line of its jurisdiction of that country. This is aptly illustrated by the following facts. A Colombian settlement was located at the mouth of the boundary river, the first below Punta Mona, which came to be known as the Sixaola. This bank, if a river had been contemplated as flowing east and west in its course from the Cordilleras to the sea, would have been the south bank of the river, as indeed at the point of settlement it was accurately speaking such bank owing to the direction of the flow of the Sixaola in the immediate region of its mouth. But disregarding this merely local condition and evidently looking at the situation with reference to the trend of the boundary line which it had entertained from the beginning and the general course of the river which had been from the commencement and without change considered to be the boundary, complaint was made by Colombia (Panama) to Costa Rica of intrusion upon "the Colombian village 'Sixaula,' situated upon the

eastern side of that river." And similar language was repeatedly used in the course of the negotiations between the parties. Indeed, it is correct to say that whatever may have been the more accurate knowledge acquired of the names of rivers and of their true location and courses and distances, there is nothing whatever in the record to indicate any action taken or any expression by word which directly or indirectly would justify the belief that up to the period when the previous award was rendered, the consideration of which we shall hereafter approach, the boundary line between the two countries as insisted upon by Panama, was made in any other way than by a river having the general trend and course of the river or rivers to which we have referred and which in practice were treated as the dividing line—a practice which, as I have said, was shown by official action in many forms, by the exercise of dominion by the respective countries and was demonstrated by the settlements which manifested the practical conception which prevailed concerning the real situation as to boundary.

(d) *The controlling effect of the action of Panama concerning the submission of the matter to a former arbitration, and the dominating influence of its conduct in connection with the hearing and submission thus previously made.*

The failure to provide for the exact delimitation of the boundary line as contemplated by the convention of 1825 may well be presumed to have produced its natural results. Certain is it that as there had been a failure to do so not only on the Atlantic but on the Pacific side of the mountains, in 1880, growing out of disputes as to rights of possession and authority in the territory on the Pacific side, a rupture between the two countries was threatened and war between them was imminent. In view of these exigencies and in contemplation of a proposed negotiation with Costa Rica for an adjustment which might obviate an armed conflict, the Senate of Colombia (Panama) on July 14, 1880, formulated a statement of the claim of Colombia embracing the following conclusions:

(1) Colombia has, under titles emanating from the Spanish Government and the *uti possidetis* of 1810, a perfect right of dominion to, and is in possession of the territory which extends towards the north between the Atlantic and Pacific Oceans to the following line:

From the mouth of the River Culebras, in the Atlantic, going upstream to its source, from thence a line along the crest of the ridge of Las Cruces to the origin of River Golfito; thence the natural course of the latter river to its outlet into the Gulf of Dulce in the Pacific.

(2) Colombia has titles which accredit its right, emanating from the King of Spain, to the Atlantic littoral embraced from the mouth of the River Culebras as far as Cape Gracias á Dios.

(3) Colombia has been in uninterrupted possession of the territory included within the limits indicated in Conclusion I.

And in another conclusion which I do not reproduce, it was virtually declared that as a condition precedent to negotiations there must be an "evacuation [by Costa Rica] of any portion of territory in which that nation may have established its authorities beyond the limits marked out in Conclusion I." Although these conclusions were communicated for his guidance to the negotiator representing Colombia, who was endeavoring to reach an adjustment with Costa Rica, it is worthy of remark that the instructions transmitting to the negotiator the conclusions of the Senate while insisting that as a *sine qua non* to the negotiations certain territory situated on the Pacific coast which was the more immediate cause of the dispute should be evacuated, made no request of such a character as to one foot of soil on the Atlantic side based on the want of right to possess along the bounding river having the course and direction which I have stated. This conduct certainly shows that even in the vivid light which must have been thrown on the controversy between the two countries resulting from the almost flagrancy of war, the parties concerning the boundary on the Atlantic coast entertained and suggested no different view of that boundary than a river, by whatever name it might have been called, following the general trend and course of the bounding river which had been asserted by Panama from the beginning, and that settlements by Costa Rica on the Atlantic coast which did not transcend or interfere with such a boundary were not really the subject of serious dispute between the two countries. It is also worthy to be observed that although the larger territorial claim of the Atlantic coast to Cape Gracias á Dios was embodied in the conclusions of the Senate under Number 2, no express instructions whatever concerning that claim were given to the negotiator, and it is in addition of importance that the President of Colombia issued a proclamation concerning the claims of that government and although in such proclamation he embodied in so many words the propositions contained in the Senate conclusions with reference to the assertion of the river boundary, no mention whatever was made as to the claim of sovereignty over the coast up to Cape Gracias á Dios as mentioned in the Senate conclusions since the Senate's statement as to that asserted right was wholly omitted

from the proclamation—a fact which gives support to the view that such controversy was not embraced by the treaty of 1880.

The rupture between the two countries was avoided and a treaty was negotiated and ratified between them for the purpose of submitting to the arbitrament of the King of Spain the disputes stated in the treaty. The preamble of this treaty recited that its purpose was "to close the only source of differences that may arise between them, which is no other than the question of boundaries foreseen in Articles VII and VIII of the convention of March 15, 1825, between Central America and Colombia, and which has subsequently been the subject of diverse treaties between Costa Rica and Colombia"—a declaration of purpose clearly embracing the river boundary dispute which was the subject provided for in the articles of the convention of 1825 referred to and which articles were therefore virtually incorporated into the treaty and became by reference a part thereof. The first article, which gave effect to the purpose thus expressed in the preamble, by its terms when reasonably construed related to the fixing of a boundary along the disputed line coming within the scope of Articles VII and VIII of the convention of 1825 to the end that the possession of both parties within their proper territory might be secured—a boundary which, as I have seen, by the acts and declarations of Colombia, by the authoritative writings of the publicists of that country, and by the very conclusions of the Senate leading up to the treaty had come to mean a river flowing from its source in the Cordilleras in a northeasterly direction to a point where it emptied into the Atlantic Ocean as the first river having its mouth below Punta Mona. And the fact that this was the subject contemplated by the treaty is further shown when it is considered that the convention of 1825 had in it an article expressly referring to a *modus vivendi* regarding the larger claim concerning the Atlantic coast to Cape Gracias á Dios, and that no reference or incorporation of the provisions on that subject was made in the treaty—a view additionally sustained by the instructions to the negotiator who commenced the negotiation of the treaty and by the President in his proclamation, in both of which the controversy as to the sovereignty of the coast line was treated as negligible for the purpose of the negotiations which the treaty consummated.

The King of Spain accepted, but before his duty was discharged, although the Government of Spain had taken initial steps towards its performance, the King died. Thereafter in 1886 the two governments negotiated an additional treaty of arbitration. The preamble of this

convention after reciting the previous treaty, the acceptance of the King of Spain, the beginning by the Spanish Government of the execution of the duties incident to the arbitration and the death of the King, declared that the parties to remove all doubt regarding the competency "of his successor [the King's] to continue to exercise jurisdiction over said arbitral suit until final judgment, have agreed to execute the following convention *ad referendum* additional to that signed * * * on December 25, 1880." The first article of this treaty recognized in express terms the right of the successor of the King or the Government of Spain "to continue exercising jurisdiction over the arbitration proposed by the two republics, and to render an irrevocable and final award in the controversy pending concerning the territorial boundaries between the high contracting parties." While no reference in terms was made to an additional power to consider and decide as an arbitrator the controversy concerning the larger territorial claim, it cannot be subject to serious dispute that under the terms of the treaty an additional power to that conferred by the previous treaty was given to the arbitrator to adjudge as to the larger claim of Panama to territorial sovereignty extending along the coast line to Cape Gracias á Dios. I say this because such is the natural result of an enumeration of the limits of the territory in dispute embraced in Article II and the statement in Article III concerning the authority of the arbitrator to decide the controversies.

I do not reproduce the text of the two articles since it is hereafter quoted [p. 932] in the analysis of the legal questions which are involved in the merits of the controversy. But in my opinion the fact that the additional power was given concerning the territorial claim clearly did not change or expand the power conferred by the previous treaty concerning the boundary claim, since such conclusion is rendered absolutely necessary by the express statements which I have referred to in the treaty that the power formerly given and which had been partially executed was to continue until final judgment, and finally by the provision saving the prior treaty from abrogation as a result of the adoption of the latter.

It having resulted from reasons purely of convenience not necessary to be stated, that the King of Spain did not complete the discharge of the duties of arbitrator begun under the first treaty nor enter upon those resulting from the second treaty, the parties in 1896 entered into a convention agreeing to submit the subjects to the arbitration of the President of the French Republic. The convention expressly declared that

it made no change in the fundamental matters referred to, and that it was but intended to submit the controversy under the terms and limitations thereof to the arbitrament of a new tribunal. Prior to the assumption by the President of the French Republic of the duties created by this treaty, the authorized representative of Costa Rica addressed to him a letter enclosing the text of the arbitration treaty and asking him to undertake the duties which it imposed. The letter in addition said: "I also enclose a geographical map of the territory in litigation upon which are indicated the boundaries claimed by each of the contracting parties." The map which was thus sent clearly delineated the bounding river, the Chiriquí, claimed by Costa Rica, and the river claimed to be the boundary by Colombia (Panama), that river being marked on the map as entering into the Atlantic the first below Punta Mona and having in its flow from the mountains to the ocean a general northeasterly direction conforming to the course and flow of the bounding river which, as I have seen, had prevailed without question or hesitation from the beginning. The river which was thus delineated on the map was designated as the "Yurquin" (Yorquin) from its source in or near the Cordilleras to a point where it emptied into a river named the "Sixola" (Sixaola), the two in the course and direction indicated thus being marked on the map as the bounding river on which Colombia relied. There is no proof in this record that such letter written by the representative of Costa Rica, was ever communicated to the representatives of Panama, but there is nothing in the record indicating that anything occurred which called for its communication, as there is nothing to show that there was any intimation of controversy between the parties as to the trend and course of the bounding river claimed by Colombia to constitute the boundary if the general controversy between Colombia and Costa Rica as to which of the two rivers was the boundary should be determined in favor of Colombia. The duty under the treaties was accepted by the President of the French Republic and the case was made up and submitted for award.

On the part of Panama an elaborate argument was submitted to sustain the claim of that country to sovereignty over the Atlantic coast to Cape Gracias á Dios, under the Royal Order of 1803, and in addition an argument was made to sustain a broad claim of territorial authority under a Royal Cedula of March 2, 1537, which it would seem was presented for the first time in the argument in question. Aside from the elaborate argument just stated there was no detailed discussion or argument on the part of Panama concerning the dispute between itself and

Costa Rica as to which of the two rivers was the boundary and nothing whatever was said concerning the course and trend and location of the river claimed by Panama as the boundary, if the river asserted by it should be found to be the true boundary, which in the slightest degree conflicted with the statements on that subject contained in the letter written by the minister of Costa Rica or which, moreover, in any way whatever challenged the source, the course and the trend of the river relied upon by Colombia as resulting from the history of the boundary controversy from the beginning which has been previously given. I say this because the only statement concerning these subjects contained in the argument made by Colombia after a discussion concerning the validity of its claim to authority over the coast line was a general reference to Colombia's title to what it called the Duchy of Veragua, which Colombia confessedly held, and the claim in the following words asserted to exist as the result of the ownership of that title: "This title alone would suffice to show the actual right of possession of Colombia over Chiriquí Lagoon, the Bay of the Admiral [Almirante Bay] and the contiguous country in the direction of the Sixaola River (dans la direction du Rio Sigsaula)."

On the part of Costa Rica the argument was addressed to an attempt to refute the larger claim as to sovereignty over the coast made by Panama and in addition as to the boundary dispute to establish that the River Chiriquí, was the true boundary and by a negative pregnant to thereby demonstrate that the river claimed by Colombia was not. But there was not one word in the argument tending to show that it was considered that if Colombia's claim to boundary was rightful, it embraced any other territory or any other river than that which had been described in the letter to the arbitrator, and which description conformed to all the facts which, as I have stated, are demonstrated by the history of the subject from the beginning.

The whole record which was before the former arbitrator is not shown to be a part of this record, but neither party disputes, if they do not in terms concede, that the substantial facts which I have previously stated were embraced in the record for the purposes of the prior arbitration. Prior to making the award and as an aid in doing so, the arbitrator appointed a commission of distinguished officials of the French diplomatic corps, and in addition the Keeper of the Maps in the National Library, to consider the subject presented by the arbitration. The written report of that commission, if any was made, is not in this record.

The award of the arbitrator was made on September 11, 1900. Leav-

ing aside certain provision contained therein as to islands both along the Atlantic and Pacific so much of the award as is necessary here to be considered is as follows, the translation from the French being taken from the argument of the Republic of Panama in this case, there being no question on the other side as to its substantial accuracy.

> The frontier between the Republics of Colombia and Costa Rica shall be formed by the counterfort of the Cordillera which starts from Cape Mona, on the Atlantic Ocean, and closes on the North the valley of the Tariare or Rio Sixola; then by the chain of division of waters between the Atlantic and Pacific, to nine degrees, about, of latitude; it will follow then the line of division of waters between the Chériqui Viejo and the affluents of Gulf Dulce, to end at Point Burica on the Pacific Ocean.

Upon the announcement of this award the Minister of Costa Rica who had also been its agent for the purposes of the proceedings under the arbitration addressed a letter to Monsieur Delcassé, the Minister of Foreign Affairs of France, in the name of Costa Rica in form at least seeking to interpret the award and requesting that a particular line be indicated by the arbitrator as a boundary. The line thus asked as an interpretation of what had been awarded was substantially like that which the Minister of Costa Rica had marked on the map which he sent to the President of the French Republic before the arbitration was undertaken as showing what the claim of Colombia was as to the river which it asserted to be the boundary and therefore as demonstrating what that country would be entitled to if its claim was allowed.

To this letter the Minister of Foreign Affairs replied as follows:

> Answering the request which you have been pleased to express in your letters of September 29th and October 23rd ultimo, I have the honor to inform you that, on account of the lack of exact geographic data, the arbitrator was not able to fix the boundary except by means of general indications; I think, therefore, that there would be difficulty in fixing them on a map. But there is no doubt, as you observe, that, in conformity with the terms of Articles 2 and 3 of the Convention of Paris of January 20, 1886, this boundary line must be drawn within the confines of the territory in dispute, as they are determined by the text of said articles.
>
> It is in accordance with these principles that it is for the Republics of Colombia and Costa Rica to proceed to the physical delimitation of their frontiers, and the arbitrator trusts, on this point, to the spirit of conciliation and good understanding with which the two governments in litigation have up to the present time been inspired. * * *

Costa Rica declined to accept the award unless it was interpreted according to its view as stated in the letter written by its minister to Monsieur Delcassé, and Colombia insisted that the award required no in-

terpretation and should be executed according to its terms. The award remained without practical effect although various negotiations were had on the subject and although a proposed treaty for adjusting the differences was drawn but failed of ratification. In this situation a treaty providing for the duty of arbitration to be performed by the Chief Justice of the United States, now being executed, was entered into. By that treaty the previous award as to the Pacific coast, as to the line crossing the Cordilleras and the dividing line on that range of mountains "to a point beyond Cerro Pando * * * near the ninth degree of North Latitude" was expressly declared to be binding, and, therefore, all controversy concerning those subjects was put at rest. It follows, therefore, that the treaty accepted in its entirety the award as to the Pacific coast and provided only by the methods and to the extent contemplated by its terms, which I shall hereafter have occasion to specifically state and consider, for an examination and decision concerning the controversy in relation to the award concerning the dispute as to the boundary between the two countries on the Atlantic coast from the mountains to the ocean.

The record contains nearly fifty volumes, and the arguments submitted as to the subject-matter in controversy are voluminous, covering on one side or the other the widest possible field and every aspect of everything that has taken place in the long period of time to which I have referred. Without reference to its materiality to the issues here to be decided there is certainly this distinction between the record now under consideration and that which was before the previous arbitrator which ought not to be passed without mention. By the terms of the present treaty, provision was made for the appointment of a commission "for making a survey of the territory"; and this request having been made, in October, 1911, such a board was organized, composed of four members, one appointed by the President of Costa Rica, one by the President of Panama, and the other two by the arbitrator. The appointees were all civil engineers of the highest attainment and distinction in their profession. They were as follows: Professor John F. Hayford, of Northwestern University, Evanston, Illinois, Chairman; Professor Ora M. Leland, of Cornell University, Ithaca, New York, Secretary; Mr. P. H. Ashmead, of New York City; and Mr. Frank W. Hodgdon, of Boston, Massachusetts. After the organization of the board and after the adoption of a plan to govern the performance of its duty, which plan was approved by both countries, a survey in the field was undertaken and accomplished after prolonged and arduous labor, and its results were

submitted in a report and in many maps and charts displaying the situation in the most careful, comprehensive and accurate manner. It is true to say, overlooking what may be qualified as minor differences, the board was in substance united. And great as is the satisfaction afforded by the action of the commission of survey, there is an additional and important cause of gratification arising from the fact that its work as to fiscal arrangements and in every other respect was aided and facilitated by the two countries whose controversy is here for decision. I do not go into detail concerning the report or the map or maps which accompanied it, since in the view now taken of the case it does not depend upon their analysis or statement. But although it is not essential to the conclusion which I have reached, it is pertinent to the contentions which I shall be obliged to notice before announcing that conclusion to state the facts shown by the report and maps of the commission concerning a continuous counterfort (range or spur) stretching from the main Cordilleras to Punta Mona which was made the boundary line in the previous arbitration. These facts show that there is undoubtedly a high spur projecting itself out in the direction of Punta Mona from the main range for a distance of about nine miles, but there is then a sudden drop of about 3600 feet in less than four miles, where an elevated but broken country begins, full of ridges, transverse to the direction of the spur. From this region continuing towards the Atlantic there is a gradual lowering except for occasional peaks, the country falling to an elevation of about six hundred feet when a distance of about sixteen miles from Punta Mona is reached, and sinking yet farther to about three hundred feet most of the way and finally subsiding into a swamp which is a mile and one-half wide, until a small eminence which marks Punta Mona is attained. Whether, as is urged, the designation of "counterfort" was mistakenly applied to such a situation, however, I am not called upon to consider, since my conclusion, as I have said, is wholly independent of that fact.

There is no real controversy between the parties as to the facts previously stated. I say real controversy because if it be that there is any dispute on the subject the preponderance of evidence makes such clear proof concerning such facts that they may be accurately said to be not disputable. And in my opinion it is also true to say that likewise the inferences which I have drawn from the facts stated in the course of making the statement are so clearly compelled by the facts stated as to be equally beyond dispute. I now come to consider the propositions relied upon by the parties in the light of the facts and the inferences which

I have heretofore or shall hereafter draw from them under a heading—The Merits of the Controversy.

The Merits of the Controversy.

Costa Rica insists, first, that under the facts the selection by the arbitrator of Punta Mona as an initial boundary point and the making of the boundary line by a range or spur of mountains extending from there to the Cordilleras was void because beyond the scope of the authority which the arbitration embraced. Second, it insists that in any event as something cannot be made out of that which does not exist, it clearly follows that the selection of the line was in other respects void since under the proof it is demonstrated that the mountain range made the basis of the award has no existence.

On the part of Panama the contention is, first, that assuming the facts which I have given in stating the history of the case to be true, nevertheless the line of alleged mountain boundary was within the power of the arbitrator to fix because the authority to do so was conferred upon him by the treaty upon which the arbitration was made. And second, that this view remains unaffected even if it be assumed that the range of mountains has no existence since the line of boundary which that range was intended to mark remains and is plainly discernible by the conformation of the country and the watershed which it contains. Third. It is additionally insisted by Panama that the validity of the line of mountain boundary must be tested not by the assumed dominancy of any general principles of law governing arbitration, but by the former arbitration treaty alone, because the treaty under which the power to arbitrate is now being exercised confines the authority of the present arbitrator to determining whether the previous award was within the terms of the previous treaty and excludes the power to hold the previous award invalid if it was within the treaty upon the theory that it conflicted with general and controlling principles of law.

Considering these propositions as a whole, inasmuch as there can be no question of the power of the two governments to have entered into the previous treaties of arbitration and to insert in them such provisions as they deemed best, it clearly results that the first proposition of Panama, if its premise be true, is well founded and is controlling since it cannot be said that action taken under the treaties was void for want of power if it was within the power which the treaties conferred. It also is patent, this being true, that it cannot be held under this treaty that an

act done under the prior treaty was void although sanctioned by such treaty because of some conception of general principles of law. This must be the case because to so do would amount to deciding that this treaty gave the power to set aside acts which were authorized by the previous treaty. It thus necessarily comes to pass that the fundamental question to be decided requires it to be determined whether the boundary line fixed by the previous arbitration was within the previous treaty or treaties. And if it was not, it must follow that its correction is within the scope of the authority conferred by this treaty; and if it was, no power here obtains to revise it. It is therefore true that the whole case comes down to the question stated: which is, the scope and meaning of the prior arbitration treaty or treaties, and the solution of that inquiry will decide both of the propositions relied upon by Costa Rica, as well as all those insisted upon by Panama.

The study of that question from the point of view of the argument presented by Panama requires the immediate consideration of the text of the previous treaty, that of 1886, the pertinent articles of which are as follows:

> Article II. The territorial limit which the Republic of Costa Rica claims, on the Atlantic side, reaches as far as the Island Escudo de Veraguas, and the River Chiriqui (Calobebora) inclusive; and on the Pacific side, as far as the River Chiriqui Viejo, inclusive, to the East of Point Burica.
>
> The territorial limit which the United States of Colombia claims reaches, on the Atlantic side, as far as Cape Gracias á Dios, inclusive; and on the Pacific side, as far as the mouth of the River Golfito and in Gulf Dulce.
>
> Article III. The arbitral award shall confine itself to the disputed territory that lies within the extreme limits already described, and cannot affect in any manner any rights that a third party, who has not taken part in the arbitration, may set up to the ownership of the territory comprised within the limits indicated.

The construction relied upon to establish that the mountain boundary was within these treaty provisions and therefore valid and not subject to be re-examined under this treaty is this: The second article, it is said, specifically states the exterior points of the vast territory which was in dispute and therefore brought within the jurisdiction of the arbitrator everything within those exterior boundaries and gave him authority at his discretion wholly without reference to any particular controversy pending or dispute existing as to claims within the boundaries, to fix such a line of boundary within the exterior limits as was deemed best. And support for this proposition is derived from the clause of the third article saying, "The arbitral award shall confine itself to the disputed

territory that lies within the extreme limits already described," the construction given to these words being that they empower the fixing of a line not only concerning a dispute as to the exterior limits, but a line within the exterior limits wholly without reference to the disputes prevailing between the parties as to land within the exterior limits. The demonstration of the extreme result which would come from maintaining the construction thus asserted is too plain to require more than to direct attention to the consequences which would result from sustaining it—consequences which could not be better exemplified than they are by the facts of this case where in a dispute only as to which of two rivers was the bounding one with no difference whatever as to what either of the parties would be entitled to if either river relied upon was made the boundary, no river boundary was made, but a mountain range was fixed carrying with it a large amount of territory to which the successful party would not possibly have had any title if every claim which was made in the dispute as to that boundary had been held to be correct. Besides, on the face of the text the curious premise upon which the argument proceeds is patent since it in substance is that from a grant of power to determine as to the "disputed territory that lies within the extreme limits" there arose the right to determine as to territory within such limits as to which there was no dispute whatever. And that this anomalous result of the proposition is not overdrawn is made manifest by the statement on the subject in the argument on behalf of Panama, where it is said:

> Article III only provides that the award shall be confined to the disputed territory within the limits fixed by Article II, and cannot affect the rights of third parties. * * *
>
> It will be noted that the only limitation which these articles imposed upon the arbitrator was with regard to the terminal points of the boundary which he should fix. He could not, upon the Atlantic, fix a line which should begin south or east of Escudo de Veraguas or the mouth of the river Chiriqui, nor north of the northern frontier of Costa Rica; nor could he fix any line which should meet the Pacific at a point south of the Chiriqui Viejo or north of the Golfito.
>
> But except in this respect his jurisdiction was unlimited. No claim was made by either party as to interior lines and nothing in the treaty prescribes any rule upon the subject. So long as the terminal points upon the two coasts were within those stated, he was at complete liberty, in the interior, to connect them by a line running in whatever course he should think proper.

I do not stop to point out how plain would be the duty to resort to every reasonable intendment to save the articles of the treaty from the

construction attributed to them if the premise upon which the proposition rests were true that their text alone afforded the measure of deciding the question of power conferred as to the boundary issue. But the question of power is not to be solved alone by the article of the treaty thus relied upon by Panama, since on the face of the record it is apparent that it must be solved by the text of a different treaty which when it is considered renders it impossible to ascribe the meaning relied upon to the provisions referred to. A brief recurrence to the history of the case previously made will make this clear since that history shows beyond the possibility of question that the boundary dispute was first provided for by the treaty of 1880 and contained a limitation or direction based upon the treaty of 1825 between Colombia (Panama) and Central America (Costa Rica) which causes it to be impossible to suppose that the extensive power now claimed was conferred concerning the boundary dispute. This becomes clearer, if it were possible to add to its clearness, when the statement is recalled that when the treaty of 1886 was drawn in express terms it reserved the powers granted by the previous treaty of 1880 and declared that the powers created under the new treaty were additional to those conferred by the former, and to make assurance doubly sure, there was added to the treaty of 1886 a clause saving from repeal the treaty of 1880.

Even upon the hypothesis that the treaty of 1880 provided both for the boundary dispute and for the territorial claim up to Cape Gracias á Dios which embraced on the Atlantic side the exterior boundaries subsequently stated in the treaty of 1886, such assumption would be without consequence because it could not possibly be assumed that the inclusion of the larger and wholly distinct territorial claim was intended to destroy the express limitations concerning the boundary claim which the treaty embodied by making reference as it did on that subject to the articles of the treaty of 1825. And, indeed, this would be the result if it were additionally supposed for the sake of argument that the treaty of 1880 and the treaty of 1886 became incorporated into one and the same instrument by the effect of the adoption of the treaty of 1886, since it would be obvious under the terms of the treaty of 1886 as thus construed that it was the clear intention of that treaty to preserve unimpaired and unchanged the powers, duties and limitations previously created and therefore to impose the duty of enforcing the two harmoniously so that the duties under both might be performed.

While these considerations dispose of all the principal arguments ad-

vanced to maintain the contention that the text of the treaty of 1886 sustains the extreme power asserted and I might well pass from the subject, nevertheless before doing so in order not to seem to overlook suggestions made or necessarily arising, I proceed to notice some considerations concerning some words in the text which have been deemed to be of importance but which I have not previously noticed in order to avoid breaking the continuity of the argument. The clause in the third article of the treaty of 1886 saving the rights of third parties, it is suggested by reasoning whose import is not clearly discernible, lends some strength to the contention that the treaty conferred the extreme authority claimed. But it is obvious that this clause instead of removing a limit, imposed one, since its plain terms evidence that it was intended in any and all events but to restrict the operation of the award so as not to affect third parties—a restriction presumably inserted because at the time the treaty was drawn the United States was insisting that rights which it asserted might otherwise without such restriction be affected, and, moreover, because the line embraced in the shore claim of Panama, as I have seen, extended beyond the territory of Costa Rica up to Cape Gracias á Dios. And the contention in another aspect, manifests a confusion like that which I have previously pointed out since it would be singular, indeed, to say that a limitation which was inserted for the purpose of protecting those who were not heard had for its object the extension of the scope of the arbitration so as to cause it to embrace as to the parties to the convention the absolute right on the part of the arbitrator to condemn them without a hearing, which, of course, would be the result if the provision had the extreme construction which it is now insisted belongs to it.

From these considerations the following general conclusions are established: (1) That the controversy as to boundary between the parties which had existed for so many years was limited to a boundary line asserted by one party and to that asserted by the other, the territory in dispute between them, therefore, being that embraced between the lines of their respectively asserted boundaries. (2) That the previous treaties of 1880 and 1886 by which the boundary dispute thus stated was submitted to arbitration, instead of going beyond the general principles of law which otherwise would have applied and conferring an extreme power to make an award wholly without reference to the dispute or the disputed territory, by their very terms confined the award to the matter in dispute and the disputed territory. (3) That as the line of boundary fixed by the previous award from Punta Mona to the Cordilleras was not within

the matter in dispute or within the disputed territory, it results that such award was beyond the submission and that the arbitrator was without power to make it, and it must therefore be set aside and treated as non-existing. The only question then is, What in other respects is the duty arising under the present arbitration from that situation?

As by the terms of the present treaty the previous award was not set aside as a whole, and the power was only given to correct it in so far as it might be found to be without the authority conferred, the consequence is that all the results necessarily implied by the selection of the mountain line from Punta Mona along the stated counterfort, which can be upheld consistently with the previous treaty, must be sustained although the mountain line itself be void for want of authority to make it. While not in express terms urged, it may be implied from the argument that the contention is that, the mountain line being out of the way for illegality, there would remain as a part of the previous award a river line composed of the Sixaola-Tarire Rivers since the award declared that the mountain line would bound on the north the valley of such rivers and hence they may constitute a boundary line within the award previously made. To dispose of this suggestion it is only necessary to point out the fallacy of the premise upon which it must rest since that premise virtually is that the previous selection was of a line formed by the Sixaola-Tarire Rivers instead of the counterfort or range of mountains. But this is so obviously refuted by the record as to need only a few words of statement to demonstrate its error. In the first place the line previously fixed did not even commence with the mouth of a river, but began at Punta Mona, and in express terms was declared to proceed along the counterfort. It is true, as is suggested, that it was said that the line thus made bounded on the north the valley of the Sixaola and Tarire, but this declaration did not convert the mountain boundary into a river one. In fact such a view of the previous award could only be taken as the result of wholly inadmissible surmises and conjectures. It is certain, as indicated by the letter of Monsieur Delcassé previously quoted, that there was not a complete knowledge of the geography of the country when the previous award was made. And it is also certain that under the previous arbitration there were present maps showing a range of mountains from Punta Mona to the Cordilleras ostensibly of such a permanent and dominant character as to cause it, if existing, to constitute a natural frontier dividing for all practical purposes the country on the one side from that lying on the other. When this is borne in mind a reason which may have given rise

to the selection of the mountains is not far to presume since the natural frontier which their presence would cause and the benefit to arise from the establishment of such frontier may well have led the mind to consider that subject from the point of view of statesmanship alone and therefore have unwittingly concentrated attention exclusively on the advantages of such a boundary and thus have diverted attention from the consideration of the limits which inhered in the submission. On the contrary the suggestion relied upon would necessarily compel it to be assumed that although a river boundary was selected, a mountain boundary was for some unaccountable and undisclosed reason named.

As it is conceded by both parties that under this treaty there is the power and duty to substitute for the line set aside, a line within the scope of the authority granted under the previous treaty "most in accordance with the correct interpretation and true intention" of the former award, I come to that subject. As it was impossible to make the previous selection of a mountain line without rejecting both the claim of Colombia (Panama) to the shore up to Cape Gracias á Dios and also without adversely disposing of the claim of Costa Rica to the boundary of the Chiriquí River, both of those express or implied awards remain unaffected by the fact that it is now held that the mountain boundary line was void. And by the same reasoning it follows that the initial point of the boundary which is to replace the rejected one must and can only be the mouth of the first river below Punta Mona, the Sixaola, since there is physically no other river mouth to respond to the claim made under the circumstances stated. Besides, this result is inevitable because the mouth of such river, under the facts stated, is indubitably the initial point on the Atlantic of the river boundary contemplated by the parties from the beginning, sustained by all the facts to which I have referred as to negotiations, declarations and settlements and the exertion of governmental power by the two countries consequent thereon. It is true it results from the previous statement that the river which was relied upon by Colombia (Panama) as the boundary was designated by various names because, undoubtedly, of the want of accurate geographical knowledge which prevailed. But whatever may have been the Babel of names, there can be no doubt that they all came to be used to designate virtually one and the same river emptying into the Atlantic at about one and the same place and having virtually one and the same course or flow from the source near the mountains to the mouth in the Atlantic. Nothing could serve to make this clearer than does the statement which was

made by the Colombian Congress in 1856 which, while it described the river as the Doraces, fixed its mouth as the one first below Punta Mona, and the further illustration which is afforded by the facts previously stated concerning the settlements at the mouth of the Sixaola by Colombia and the claim of authority which the government of that country asserted thereunder. And this serves to make clear what river was referred to by the use of the name Culebras, since the President of the State of Panama had in 1870 declared that that river was the same as the Doraces. Moreover, when the situation is rightly appreciated these facts readily explain why in the resolutions of the Colombian Senate which immediately preceded the treaty of 1880 the river upon which Colombia relied as the boundary was described as the Culebras and not as the Sixaola, which latter river was then known to be the river having its mouth the first below Punta Mona, and therefore was the same as the Doraces or Culebras. But the claim of Colombia as first formulated in 1836 in the organization of the territory known as Bocas del Toro, called the river whose mouth was fixed as the boundary, the Culebras. And therefore it is quite natural to assume that in stating the claim for the purposes of the resolutions and the controversy then pending, desirous of losing nothing of the original right and of retaining everything that had accrued under it by way of negotiations, admissions and settlements, the original description was adhered to and reiterated—a conclusion whose cogency is greatly reinforced when it is considered that years before Señor Madrid, the Colombian publicist, had recognized that the river which Colombia referred to as the Culebras was the river which Costa Rica referred to as the Sixaola. To adopt views contrary to those just stated would necessarily lead to the conclusion that because in formulating its claim Colombia in order to preserve it in its integrity had resorted to the definition of that claim as originally stated, it had thereby abandoned its right, or, what is equivalent thereto, had by resorting to the most efficient way of stating that claim acquired a nonexisting, unheard of or imaginary one.

The only remaining question then is, how is the boundary line to proceed from the mouth of the Sixaola River to the Cordilleras until it joins the line terminating "beyond Cerro Pando"?

On the one hand it is claimed that such line should follow the thalweg of the Sixaola River to the point where it joins with a river called the Yorquin, then follow that stream in a southerly direction to its source in or near the mountains and thence to the point "beyond Cerro Pando."

On the other hand the contention is that the line should run by the Sixaola passing the entrance of the Yorquin to a point where the Tarire is attained and then follow that river to its source in the Cordilleras and thence by a line to the point "beyond Cerro Pando." This contention rests upon the assumption that the Sixaolo and Tarire Rivers are shown to be really one and the same, although designated by different names. It cannot be denied that the direction of the boundary river, if the Sixaola-Tarire be selected, would be wholly at variance with the trend of the river boundary contemplated from the beginning and would project a line of boundary into territory over which the authority of Costa Rica was never questioned and thus give to Panama what she had never claimed. While, on the contrary, the line of the Sixaola-Yorquin, if followed, would in substance conform in its course and direction with that which had been recognized as the direction of the boundary line from the beginning and had been virtually treated as not the subject matter of dispute up to and during the proceedings had under the previous treaty. And no reason is afforded for departing from the river line thus shown to be the boundary line within the dispute between the parties by suggesting that some other river line would most comport with the interests of the two governments and best subserve the purpose of a boundary. To admit such considerations would in substance but be indulging in views of public policy and public interest which would lead the mind away from the fundamental proposition which is here controlling, that is, the execution of the duty of arbitration which calls for judgment as to a dispute between the parties and affords no room for the application of discretion beyond the limit which that consideration necessarily imposes. Discretion or compromise or adjustment, however cogent might be the reasons which would lead the mind beyond the domain of rightful power, and however much they might control if excess of authority could be indulged in, can find no place in the discharge of the duty to arbitrate a matter in dispute according to the submission and to go no further. No more fatal blow could be struck at the possibility of arbitration for adjusting international disputes than to take from the submission of such disputes the element of security arising from the restrictions just indicated. Under these circumstances, since the duty here is not to elucidate and pass upon mere abstract questions of geography, nor to substitute mere expediency for judgment, but to determine what was the river claimed as the boundary by Colombia, declared by her to be the boundary for so many years, to which she

asserted rights and which virtually was claimed to be the boundary upon which she relied prior to the entry into the previous treaty for arbitration and in the proceedings under that treaty, it is plain that the Sixaola-Yorquin is the line which should take the place of the line from Punta Mona along the counterfort of the Cordilleras to the point "beyond Cerro Pando," as declared in the previous award.

In framing the award and coming to particularly specify the new line there may arise some difficulty because of the absence of precise geographical data as to the situation at the headwaters of the Yorquin River and therefore of the considerations which should control the drawing of the line from such headwaters to the Cordilleras. In the argument of this case Costa Rica stated a formal decree which it deemed should be entered upon the hypothesis that the award here made should be against the mountain line and in favor of the Sixaola-Yorquin line, and no objection to the form of such proposed decree has been made by Panama. Following the line to the headwaters of the Yorquin, the proposed decree from thence directs a stated line to the Cordilleras. This line rests upon the assumption that the headwaters of the Yorquin lie in the region of the northern slope of the northern watershed of a river known as the Changuinola, and the proposed line runs from the headwaters of the Yorquin along such watershed to the Cordilleras. The situation thus assumed by the proposed decree to exist in the region of the headwaters of the Yorquin is in conformity with maps which are in the record, one of which was made by the commission of engineers in this case, but which is not, however, the result of a survey by that body as it was not called upon by either party to make one. As the line thus suggested would seem to be in all respects the most reasonable, I shall adopt it with some verbal modifications as a part of the award to be entered, however, with the following reservation: without prejudice to the right of the parties in case there should be differences between them resulting from contentions as to the topography of the country between the headwaters of the Yorquin and the Cordilleras differing from that above stated, to raise such question in any appropriate way consistent with the provisions of the treaty now being enforced.

Coming to give effect to the opinions previously stated and the conclusions deduced from them, the award now made under the authority of the treaty is as follows:

1. That the line of boundary which was purported to be established by the previous award from Punta Mona to the main range of the

Cordilleras and which was declared to be a counterfort or spur of mountains in said award described, be and the same is held to be non-existing.

2. And it is now adjudged that the boundary between the two countries "most in accordance with the correct interpretation and true intention" of the former award is a line which, starting at the mouth of the Sixaola River in the Atlantic, follows the thalweg of that river, upstream, until it reaches the Yorquin, or Zhorquin River; thence along the thalweg of the Yorquin River to that one of its headwaters which is nearest to the divide which is the north limit of the drainage area of the Changuinola, or Tilorio River; thence up the thalweg which contains said headwater to said divide; thence along said divide to the divide which separates waters running to the Atlantic from those running to the Pacific; thence along said Atlantic-Pacific divide to the point near the ninth degree of north latitude "beyond Cerro Pando," referred to in Article I of the treaty of March 17th, 1910; and that line is hereby decreed and established as the proper boundary.

3. That this decree is subject to the following reservations in addition to the one above stated:

(a) That nothing therein shall be considered as in any way re-opening or changing the decree in the previous arbitration rejecting directly or by necessary implication the claim of Panama to a territorial boundary up to Cape Gracias á Dios, or the claim of Costa Rica to the boundary of the Chiriquí River.

(b) And, moreover, that nothing in this decree shall be considered as affecting the previous decree awarding the islands off the coast since neither party has suggested in this hearing that any question concerning said islands was here open for consideration in any respect whatever.

(c) That nothing in the award now made is to be construed by its silence on that subject as affecting the right of either party to act under Article VII of the treaty providing for the delimitation of the boundary fixed if it should be so desired.

BOOK REVIEWS

A Digest of Cases Decided in France relating to Private International Law. By Pierre Pellerin. London: Stevens & Sons, Limited, 1914. pp. 134.

It seems almost a mockery to speak or write of the rules of international law at a time when every principle looking to the peaceful settlement of disputes involving nations and national laws appears to be toppling in one vast cataclysm. And yet those of us who have labored in these fields have still an abiding faith in the vitality and final triumph of the rules of humanity and justice that underlie these relationships.

It is with a spirit chastened by somber reflections that I pen this little review of the work of M. Pierre Pellerin, *Licencié en droit* of the University of Paris, who at this moment perhaps is bravely fighting his country's battles at the front or sleeping the sleep that knows no waking in a soldier's grave.

The book is intended only as a brief digest of the actual decisions of the French courts in cases involving questions of private international law, embracing in all 134 pages.

After the preface the author devotes a page to an explanation of the abbreviations used in making citations to authorities. This is followed by two pages of what he calls "a dictionary of French legal terms for which concise English equivalents do not exist." The last eight pages contain an index.

In the analytical arrangement the various heads are classified in the following alphabetical order:

Arbitration (two pages; one case).

Capacity and Status (ten pages; eight cases).

Company Law (fourteen pages; eleven cases).

Competence of Courts and Rules of Procedure (twenty pages; eighteen cases).

Contracts (four pages; four cases).

Divorce (seven pages; nine cases).

Domicile (one page; one case).

Execution of Foreign Judgments (seventeen pages; thirteen cases).

Intestate and Testamentary Succession (fifteen pages; twelve cases).
Marriage (eight pages; nine cases).
"Regime" Matrimonial (six pages; six cases).
Registration (one page; one case).
Security for costs (two pages; three cases).
Trade-marks and Patents (one page; two cases).
Wills (three pages; three cases).

Taken as a whole, the book represents a faithful and quite successful attempt of a French author to frame in an English setting certain decisions of the French courts upon the subjects enumerated.

But in English and American law the word "digest" has come to embrace the idea of completeness, of covering all cases on the given subject. In this aspect the title of the book is a misnomer, as an examination of the foregoing analysis will disclose. It is inconceivable for instance that only four cases touching private international law as applied to contracts have been decided by the French courts since 1896, the date of the first case given. That a complete digest is not intended appears also from the fact that it comprises, in the main at least, only cases in which British and American litigants are concerned.

Comparing the book in its method and mechanical arrangement with the legal digests published in America, one is struck by the lack of attention paid to cross-references, running titles, and the side-helps and aids which take so prominent a place in our works of the kind.

The reader is also impressed by the difference in the ease with which cases are cited. In America we would cite a case "Smith *v.* Jones, 153 Mass. 270." Our French digest, mentioning no names of parties, would cite it as follows: "27th May 1911.—Court of Appeals of Douai.—'Recueil des Sommaius' 1912, page 1640," or "21st May 1905.—Civil Court of Lille.—Clunet 1909, page 181."

Space, or the want of it, forbids the discussion of the actual points decided by the French courts in the cases digested; but some of the decisions, it must be admitted, sound strange to American ears. Perhaps the most curious is the "Renvoi" doctrine which results from the fact that in France many questions are decided in accordance with the law of nationality which elsewhere are determined by the law of domicile. Hence if an Englishman becomes domiciled (but not naturalized) in France, and a question arises as to his status which by French law would be governed by the law of his nationality (English law) and by English law is governed by the law of his domicile (France), a sort of an *impasse*

results, and it is easily seen that the unfortunate Englishman may find his status suspended indefinitely between the devil and the deep blue sea.

In conclusion, it may be said that this little book will doubtless prove of considerable value, especially to those practitioners who may have occasion to bring or defend suits in France or to advise clients as to the conduct of business in that country.

RALEIGH C. MINOR.

The Monroe Doctrine: An Obsolete Shibboleth. By Hiram Bingham. Yale University Press. 1913. pp. ix, 154. $1.15 net.

The name chosen for this book is more startling than the proposals which it makes. It has had the desired effect of attracting attention; but because of it the book has probably met with more condemnation than praise, in the United States at least. What the author proposes to do could be done without any abandonment either formal or informal of the Monroe Doctrine. It is not so much a substitute for as an extension of the old doctrine.

In his preface the author says: "What has been attempted is to sketch the growth of the Doctrine, to indicate the obligations and disadvantages it entails, and, more particularly, to portray the attitude toward it, and toward us, of our neighbors to the south. I have also suggested, very briefly, the outlines of a new foreign policy. It is evident that the problems which are likely to arise in the future will require something more than the mere negation of outgrown doctrines."

He admits that the doctrine "has had a very decided effect upon the history of the western hemisphere," and that without it "the American republics would have found it very much more difficult to maintain their independence." But he shows that there have been changes in the Latin states which he thinks makes it no longer a necessity for them. Furthermore, he shows that there have been great changes in the doctrine itself as it has been interpreted by recent administrations, and that in its later form it is much more distasteful to the Latin states. Secretary Olney's declaration in 1895 in connection with the Venezuela boundary controversy he finds chiefly responsible for this "new Monroe Doctrine." He argues that several of Mr. Olney's assertions were based on false assumptions, and cites very good authority in support of his views. Several extracts from messages of President Roosevelt show the further development of the new doctrine during his administration; and the Lodge resolution of 1912 illustrates the "last phase."

He cites more than a dozen acts of the United States during the last thirty years which were insulting to the Latin states and for which the only justification is the Monroe Doctrine; and says that it "interferes with the natural desires," and "clashes with the sovereign rights of independent states." He shows that the United States is continually in danger of complications with European states because of unavoidable interferences in their dealings with Latin American states. Foreign loans made to the Latin countries by capitalists in Europe are the chief source of danger. He asserts that "European countries have the right to look to us to do that which we prevent them from doing."

In his section on Latin American opinion concerning the doctrine he declares that its continuance "is insulting and is bound to involve us in serious difficulties with our neighbors." He dwells on the territorial, numerical, and commercial strength of the three leading countries, Argentina, Brazil, and Chile, and declares that they are "abundantly able to take care of themselves and are in a position to laugh at the old Monroe Doctrine." He quotes from many prominent South Americans showing their hatred of and contempt for the attitude of the United States. He has discovered a considerable agitation in these countries of which the purpose is to induce their governments to prepare to resist what they regard as "The North American Peril." Even sincere declarations of good will and sympathy on the part of the United States for the Latin countries are looked upon with suspicion, and considered mere polite statements intended to hide a real desire for aggrandizement. Secretary Root's speeches during his South American tour were so misinterpreted.

He asserts that the doctrine is a hindrance rather than a help to the United States in maintaining not only the friendship and good will of the Latin Powers, but in opening up profitable commercial relations.

The constructive part of this very interesting and suggestive essay is contained in the closing pages. He says: "Let us bury the Monroe Doctrine and declare an entirely new policy, a policy that is based on intelligent appreciation of the present status of the leading American Powers; let us declare our desire to join with the 'ABC' Powers in protecting the weaker parts of America against any imaginable aggressions by the European or Asiatic nations." A little further on, he says: "If it is necessary to maintain order in some of the weaker and more restless republics, why not let the decision be made, not by ourselves, but by a congress of leading American Powers? If it is found necessary to send

armed forces into Central America to quell rebellions that are proving too much for the recognized governments, why not let those forces consist not only of American marines, but of the marines of Argentina, Brazil, and Chile as well?"

It is correct to call this "an entirely new policy" so far as its having been tried is concerned. The idea is not entirely new, however, although it had not been discussed widely before this book was published. The Adams-Clay administration within three years after the original declaration were expressing ideas very similar to this in their instructions to ministers. They did not propose a formal alliance, indeed, and it is a serious question as to whether that would be a wise course now, or necessary to accomplish the end proposed. They suggested that the governments of other American countries be invited to declare sentiments similar to those contained in Monroe's message. Their idea seems to have been to have any or all join in the declaration, instead of limiting it to the most powerful as now suggested. To so limit the understanding would involve invidious distinctions. As suggested in the beginning of this review, it is not necessary to "bury the Monroe Doctrine" in order to adopt the new policy.

WM. R. MANNING.

The Neutrality Laws of the United States. By Charles G. Fenwick. Washington: Carnegie Endowment for International Peace. 1913. pp. xii, 201.

This report on the neutrality laws of the United States was prepared by the author in pursuance of a resolution of the Board of Trustees of the Carnegie Endowment for International Peace "that the Division of International Law, be, and it is hereby directed to examine and report to the Board upon the neutrality laws of the United States, and to suggest in their report improvements tending to make them more efficient." It is not unlikely that the resolution was inspired by events in Mexico, but the breaking out of a great European war comparable to that which called the neutrality laws of the United States into existence makes the publication of the report especially opportune.

A short chapter is devoted to the character and scope of neutrality laws. The author then takes up more in detail the history and development of the neutrality laws of the United States, their authoritative interpretation, and the deficiencies in them. He then gives the draft of an amended neutrality act and concludes with an appendix containing

statutes, resolutions, proclamations and instructions bearing on the text.

It is not an uncommon error to confuse traffic in contraband articles, which may be suppressed by the belligerent whom it would injure, with the unneutral conduct of individuals which, within its borders, it is the duty of the neutral state to suppress. It is hard for the uninitiated to see why a neutral government should allow the clearance for a belligerent port of a ship loaded with munitions of war and yet refuse to a belligerent war ship within its ports a slight addition to its armament. Especially is this so where the neutral and the belligerent with whom the traffic is maintained are contiguous so that the other belligerent has no opportunity to suppress the traffic. The continuance or the discontinuance of the traffic may mean the success or failure of the belligerent's cause. It was considerations such as these that probably prompted the joint resolution of March 14, 1912, by which the President was authorized to regulate traffic in arms and munitions of war with any American country in which "conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States." When the 'domestic violence' does not assume the proportions of international war, it is clear that the international law of neutrality is not involved, but were the parties to the domestic violence recognized as belligerents by the United States there would be danger of confusing the dictates of the joint resolution with the requirements of the international law of neutrality, and this our author tells us was true even in the discussion arising out of the recent troubles in Mexico. So also the British Foreign Enlistment Act goes beyond the requirements of the international code in prohibiting British subjects from quitting British dominions with the intention of enlisting in the service of any foreign state at war with a friendly state. States may as a matter of policy go further than international obligation dictates and it is necessary to keep clearly in mind where the international obligation ends and the purely municipal regulation begins.

Of more importance, however, is the question whether the full measure of international obligation has been met, and the author points out numerous places where the Act of 1818 falls short of present standards of neutrality. It was the United States under the presidency of Washington which led the way to the modern law of neutrality, and it behooves us not to allow to slip from us the leadership which is so fittingly ours. The author has placed within easy reach the information on which

a scientific overhauling of the Act of 1818 can be made and has drafted an amended Neutrality Act which may well be made the starting point of Congressional action. In an era of constructive legislation we should produce a Neutrality Act which will be a model for the world to follow.

PERCY BORDWELL.

La Autarquia Personal: Estudio de Derecho Internacional Privado. By Dr. Antonio S. de Bustamante y Sirven. Habana: Imprenta "El Siglo XX" de Aurelio Miranda. 1914. pp. 269.

"La Autarquia Personal," being a study of private international law, by Dr. Antonio S. de Bustamante y Sirven, Professor of Public and Private International Law in the University of Havana and a member of the Hague Court, has just come from the Cuban press. It is a book of 270 pages, divided into fourteen chapters.

In seeking the meaning of the title, one looks in vain in Spanish dictionaries, but on reading the work, it is found that the author has had recourse to Greek words in order to express the exact meaning he wishes to convey. The word "autarquia" is derived from two Greek words, "autos," meaning one's self, and "arjo," meaning to command or to rule. These words he says express perfectly the idea of a zone or region of law in which one can act freely by himself and indicates also that this power does not result from a concession of another sovereign entity, but comes from the particular situation and the exigencies of that one who enjoys them.

As the sphere of international action of man grows, there is increase also of the necessity of recognizing the efficacy of his voluntary acts and of permitting that he select his law in all that which does not affect the collective interest of the state.

Chapter two is devoted to a discussion of *Autarquia Personal* in the science of law, as stated by different authors and international conferences. Chapter three deals with *Autarquia Personal* as found in the positive law, and the author quotes examples as seen in the codes of different countries of the world.

In chapter four the author states that laws of a country may be reduced for the national who lives in it to two great categories, imperative and voluntary or suppletory. For the stranger, law may be divided into three great groups, imperative, voluntary and inapplicable.

Chapter five deals with the concept of the laws of private order. The right which persons have to regulate, according to their will, a certain

number of juridical relations is recognized by all positive legislations and no one censures such precepts, but it is recognized that the legislator cannot foresee all the possibilities nor satisfy all the necessities and, leaving to the parties a sphere of action by which they may formulate by themselves their law, the interest of the state does not suffer, neither does the power and authority of the codes.

This faculty is not lost when a person goes abroad, nor can it be denied to the foreigner who resides in our country. It results independently of the nationality and of the residence, because its foundation is not found in the residence or in the nationality or in the causes determining its existence.

Chapter seven deals with the effects of the law of private order. The *Autarquia Personal* is the fountain of great juridical progresses, because it permits the will to continue creating new institutions and customs without molds or codes, according to social necessities. Text writers, legal congresses and codes in force have repeated this necessity and are accustomed to seeing that the effects of these laws cannot be admitted when they may be contrary to public law or good customs.

In resumé, the effects of the laws of private order are double so far as territorial extension is concerned, because these laws regulate, are accepted and are applied within and without the nation which promulgates them; uniform in regard to their personal efficacy, because they are found in all territory, at the disposition of nationals and foreigners without difference; absolute in every case for the country from which they proceed and for the nation in which they are invoked, as a substantial part of its system over the limits in the space of legislative competency; extraterritorial, in regard to the sphere of action of the express or tacit will and in regard to the recognition of the presumed will, and originate, as legitimately as any other from acquired rights, whose force and international recognition cannot find other obstacles than those derived from the public order in the nation where they may be invoked.

The next six chapters discuss the tenor of private order with reference to the civil law of persons, property, contracts, mercantile law and procedure. The author illustrates how in some cases *Autarquia Personal* is permitted while in others it is not possible, and he shows that it is impossible in criminal procedure, but is permitted under certain circumstances in civil procedure.

Chapter fourteen contains the conclusion of the author. He says, "The summary exposition of the fundamental principles of private

international law lead us to the conclusion that there exist three groups of laws from the point of view of the limits in space of legislative competency; those of private order, those of public internal order and those of public international order."

The whole object of this book seems to be to demonstrate the great amount of personal liberty which exists without restraint of law and to prove that positive law often results from the *Autarquia Personal* which has been exercised for considerable time by individuals. The book is written in a clear, forceful and attractive style. It shows the profound grasp which the author has of private international law. It is interesting and instructive and well worth reading.

WALTER S. PENFIELD.

The Rules of Land Warfare. Prepared, with the approval of the Secretary of War, by the Army War College, Washington, D. C. 1914.

The appearance of an authoritative handbook of the laws governing the operations of war on land coming, as it does, during the pendency of a great European war, is most opportune. The strategic and tactical principles governing military operations have undergone important modifications in recent years, and these changes have had a decided influence upon the laws of civilized warfare; for, like other bodies of controlling principles, the laws of war are undergoing steady but constant changes; the extent and character of these changes, together with their effects upon the accepted rules of war, can only be discovered by a comparison of works upon the subject which have appeared at considerable intervals of time.

Colonel Edwin F. Glenn has wisely decided to base his work upon the succession of international agreements which have been entered into in recent years with a view to define the rights and duties of belligerents in land and naval warfare. These are so numerous and cover the field so fully as to enable a treatise like that under examination to be prepared, composed for the most part of treaty stipulations to which the principal states of the world are signatory parties. These undertakings, taken separately, are somewhat lacking in the order and logical sequence of their several parts, and one who desires to know all that has been said upon a particular subject must consult a number of treaties entered into, in some cases, at considerable intervals of time.

Colonel Glenn, who was charged with the preparation of the volume

by the Army War College, has done his work exceedingly well. He has approached the subject from the proper point of view by making a logical arrangement of the several subdivisions of the subject; under each of these heads he has arranged the appropriate conventional requirements, connecting them, when necessary, by a few words of comment or critical illustration; these are numerous and though briefly presented, are sufficient to make clear the text of the conventional undertakings which constitute the substance of the work. At the conclusion of the text the several agreements are given in full, and these include all the instruments from the Declaration of Paris in 1856 to the most recent deliberations of the several conferences at The Hague. The work is well printed, is easy of reference and has an excellent index. It cannot fail to be of the greatest assistance in following the course of the great war now in progress in continental Europe.

GEO. B. DAVIS.

Consular Treaty Rights and Comments on the 'Most Favored Nation' Clause. By Ernest Ludwig. Akron, Ohio: The New Werner Company. 1913. pp. 239.

This work, despite its general title, is confined almost exclusively to a consideration of the treaty rights of foreign consuls in the United States with respect to the administration of estates of their nationals decedent in this country. The writer, who is Consul of Austria-Hungary at Cleveland, Ohio, states in his preface that the volume contains a brief primarily addressed to the probate judges of that part of the United States included within his consular district, as well as to other judges who may have to pass judgment in matters involving consular treaty rights. The work deals with its subject from the Austro-Hungarian standpoint and does not investigate the powers of consuls of other foreign countries, except as incidental to the discussion of the legal force of the 'most favored nation' clause. The first chapter contains excerpts from the existing consular convention between the United States and Austria-Hungary, followed by excerpts from several other consular conventions of this country wherein other or greater powers may appear to be granted to consuls. These are followed by epitomes of some forty cases decided in the State courts, and the case of Rocca *v.* Thompson, decided by the United States Supreme Court. The treatment of these cases is not entirely satisfactory, as, for instance, that of the case of *In re* Lis' Estate, Austro-Hungarian Consul *v.* Westphal, et

al. (December 27, 1912), 139 N. W. 300, wherein the court held that while the Swedish treaty gave in terms the right to be appointed as administrator this right was qualified by the language "so far as the laws of each country will permit." This, the real point of the case, is not adverted to by the author.

The volume concludes with a discussion of the legal effect of the 'most favored nation' clause in commercial and consular treaties, and an appendix consisting of an opinion of Attorney General Caleb Cushing of October 14, 1853, regarding the surrender of deserting seamen. The lack of a table of contents and an alphabetical list of cases is felt, especially as an identical running page head is preserved throughout the volume. Nevertheless, the work will doubtless prove a convenient and suggestive aid to persons interested in this special branch of probate litigation, as it brings within a small compass much information that can be otherwise found only by access to numerous bulky volumes.

HENRY G. CROCKER.

Des Droits sur les Lettres Missives. By François Geny. 2 vols. pp. xlii, 400, 452. Paris: Larose & Tenin. 1911. 20 fr. net.

Any book of Geny's will be approached with a natural prejudice in its favor. The learned professor of law at Nancy has already given hostages on the field of jurisprudence which no one would wish to have restored. He is one of the few living French authorities in legal science whose fame extends as far away as Berlin. The present work is an application of the critical principles of interpretation advanced by the author in a remarkable work, now out of print and greatly in demand, published under the title, *Méthode d'interpretation et sources en droit privé positif* (Paris, 1899).

Every developed system of law has had its liberals and its reactionaries, its Hanafites and Malekites, its Proculians and Sabinians, its Mansfields and Kenyons. The fact itself of legal development inspires these oppositions. The law in the process of becoming a science tends progressively to overshadow the utilities of life in favor of an unyielding conceptual technic. To change the figure, it swallows up each new situation, assimilates it, and makes it a part of tissues already created. A man is as old as his arteries, and a legal system is as old as its technic. No method in practice has yet been discovered which will prevent the deposit of technical lime salts in the arteries of the legal structure, and render it immune from the hardening inflexibilities of age. Literally,

legal systems must be born again and again to accord with the perpetual youth of life. Geny would resist this imminent law of evolution with the magical solent of "libre recherche." He protests against the ancient method of putting new wine into old bottles. He combats the omnivorous appetite of the law which ingests everything old and new without discrimination, and which classifies whatever comes to its capacious maw under the rude classification of flesh or grass. In a word, Geny would substitute for a system which operates with logical rules, a method of legal application constantly responsive to an ideal of justice suggested by conscience and defined by social conditions. He is not the first one in jurisprudence who has thus resisted, and objected. Many years ago Jhering saw clearly what Geny now sees, and fought the conceptual categories with the weapons of a brilliant irony; but it is to Geny's credit that he was the first to investigate the foundations of the whole problem in a thoroughgoing and scientific spirit.

Today, legal method is the leading problem of legal science, and our author has again contributed recently a richly documented work which probably will long be taken into account in the world-wide effort to provide a solution. The problem itself has been primarily evoked by the existence of codes which were constructed either in a period of agricultural economy or upon a basis of an individualist polity, and which have survived without substantial alteration, long enough to be overtaken by an intense industrial era. The social point of view has undergone essential changes, while the official tradition has remained firm. Everyone admits that from time to time a readjustment is necessary between law and morals, but there are many who will refuse to subscribe the program of an unlimited *freie Rechtsfindung*. It is believed in some quarters that to make of each judge a new Moses would not be a desirable situation either for the law or for society. It is also believed that legal rules are already sufficiently plastic and already involve so large an element of unavoidable discretion in application that to grant in the administration of justice the power to the judge to bridge the inevitable abyss between law and social conscience would be destructive first of the law and then of any reasonable stability of social institutes. Undoubtedly there is an Aristotelian mean between undue rigidity, on the one hand, and formless fluidity on the other, and, to a degree, at least, Geny is representative of the middle course; for he would not put in place of rules spontaneity and instinct. He is a progressivist, but not an anarchist, as has been charged by some of his critics. Natural law

for him is too elusive and vague. As he puts it, his method, which is realistic and critical, does not abandon itself to the "seductions of intellectualism," but is based upon a pragmatic theme which urges an equilibration of interests as the supreme end of justice.

This is neither the time nor the place to find a quarrel with Geny's point of view. Undoubtedly there may be much to suggest contention, especially where he leaves the groundwork of analysis, where he has rendered incomparable service, and ventures into the field of synthesis and construction. The next years of activity in legal science will find it necessary repeatedly to cover Geny's positions and ideas, and much permanent value undoubtedly will accrue from his pioneer labors.

As yet nothing has been said here specifically of Geny's book, because it is simply a convenient vehicle to carry to a conclusion the ideas already discussed. A "lettre missive" is defined as a written conversation. The subject is well chosen for application of the process of "libre recherche," in that the author is not inconvenienced at every point, by a large mass of legal materials which have already officially given a quietus to every legal question to be considered, and which, therefore, would leave to the author nothing to do except to record his agreement or dissent. The law of "lettres missives" is an open sea, and accordingly affords the utmost scope for putting into concrete form the abstractions of a theory of legal method.

The entire elaboration of the law governing letters is founded on a central principle of a right of secrecy in letters which is a special aspect of the liberty of the person, which includes freedom of thought and opinion. Geny opposes the view of Valery and Jardel, who recognize no special right of secrecy in letters and put the limits of protection of correspondence at the points where there is a violation of some special or general obligation. His method of attack is hierarchical. He develops his subject in the following order: (1) the general right to liberty and inviolability of correspondence; (2) the right of secrecy; (3) right to the use and possession of letters; (4) the right of publication; and (5) proof of letters for civil and commercial purposes. In a second part he considers in a parallel fashion the law concerning letters in connection with powers and authority over infants, lunatics, prisoners, etc., rights of spouses, heirs, creditors, and letters in the administration of criminal justice. The perpetual contest between form and reason is always resolved by the author as hardly needs to be stated, in favor of the latter.

One's curiosity is aroused in the subject by the fact, apart from the

considerations already noticed, that a great variety of the questions treated touch matters which rarely come into legal conflict, although the possibilities of such conflicts are readily seen. Geny has apparently exhausted everything that has to do with French legislation, jurisprudence, doctrine, and legal history. It does not appear that he has overlooked any source of information. Novel as his subject appears to be in view of the neglect of positive law to deal with it, it is disclosed by his valuable bibliographies that the French and the Germans have contributed an amazing number of monographs in this field. The present work beyond question will be considered a valuable addition to legal literature. It will be commended for its sane idealism, and its clear and outspoken emphasis of the rights of personality which, in a sociological atmosphere, are in danger of being unduly pushed aside by the overwhelming force of the undifferentiated crowd. The world is not yet ready to dispense with individuals. Lastly, this work will be approved not only as based on an essentially sound starting-point, but also as an authoritative reference work in France on these questions as they happen to enter the sphere of litigation.

ALBERT KOCOUREK.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For List of abbreviations see Chronicle of International Events, p. 890]

Academy of International Law. Internationale Hochschule für internationales Recht in Haag, Die. *Heinrich Harburger.* Deutsche R., *39*:187. Aug.

Africa. Neutralisierung Afrikas, Die. Deutsche R., *51*:99. July.

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